No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

TERRY CAMPBELL,

Petitioner,

v.

STATE OF LOUISIANA

Respondent.

On Petition for a Writ of Certiorari
to the Louisiana Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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1.a. Whether a white defendant has standing to object to the race-based exclusion of grand jury foremen on Equal Protection grounds even if defendant is not of the same race as the excluded grand jury foremen?

b. Whether a white defendant has standing to raise the due process claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under the Fifth and Fourteenth Amendments to the United States Constitution?

c. Whether a white defendant has standing to raise the fair cross-section claim that the former and current foremen of the grand jury which handed down his indictment had been selected in a pattern demonstrating racial discrimination against blacks in violation of defendant's rights under Fifth, Sixth, and Fourteenth Amendments to the United States Constitution?

2.a. Whether a criminal defendant's Fifth Amendment and *Miranda* rights are violated by law enforcement officers who obtained statements when: 1) the officers have been ordered by the court not to question defendant, 2) the court appoints an attorney for defendant and informs the officers of such and they failed to inform defendant, 3) defendant asserts his right to remain silent, and 4) defendant does not and can not waive his right to remain silent?

2.b. Whether a criminal defendant's Sixth Amendment rights to an attorney are violated by law enforcement officers who obtained statements when: 1) the officers have been ordered by the court not to question defendant, 2) the court appoints an attorney for defendant and informs the officers of such and they failed to inform defendant, 3) defendant asserts his right to remain silent, and 4) defendant does not and can not waive his right to remain silent?

3.a. Whether Louisiana Code of Criminal Procedure, Article 648A which requires criminal prosecution to resume unless the court determines that there is clear and convincing evidence that the defendant has mental capacity to proceed violates the ruling of the United States Supreme Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996)?

3.b. Was defendant's due process rights violated when defendant was found guilty despite the overwhelming evidence of insanity at the time of the crime?

4. Whether a criminal defendant is deprived of due process rights when his conviction is obtained based on jury instructions which did not require defendant to have criminal intent at the time of the criminal acts?

5. Whether a criminal defendant's due process rights are violated when a trial court gives the jury a definition of manslaughter so incomplete that it could not adequately consider that as a responsive verdict?

LIST OF PARTIES

Terry Campbell is the Petitioner. He appears herein through retained counsel, Richard V. Burnes, 711 Washington Street, Alexandria, Louisiana 71301-8030, (318) 442-4300.

Respondent is the State of Louisiana through Attorney General Richard P. Ieyoub, 301 Main Street, Sixth Floor, One American Place, Baton Rouge, Louisiana, 70801, (504) 342-7013, and/or District Attorney Brent Coreil, Post Office Drawer 780, Ville Platte, Louisiana 70586, (318) 363-3438.

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The unpublished transcript of the denial of defendant's *Motion for New Trial* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page J-1. The unpublished Judgment denying defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page H-1. The unpublished transcript of the hearing on Defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court, Parish of Evangeline, Number 45,690-F, is included in the appendix beginning at page G-1.

JURISDICTION

The Louisiana Supreme Court rendered judgments sought to be reviewed in this case on October 2, 1995, and on January 10, 1997. The Louisiana Supreme Court denied defendant's timely application for rehearing with respect to the first judgment in an order dated November 3, 1995. 28 U.S.C. § 1257 confers on this Court jurisdiction to review on writ of certiorari the judgment of the Louisiana Supreme Court. Louisiana Attorney General Richard P. Ieyoub has been notified and served a copy of this *Petition for a Writ of Certiorari*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes involved can be found in the appendix to this petition beginning at page M-1:

The Fifth Amendment to the Constitution of the United States
The Sixth Amendment to the Constitution of the United States
The Fourteenth Amendment to the Constitution of the United States
28 U.S.C. § 1257
Louisiana Code of Criminal Procedure, Article 8
Louisiana Code of Criminal Procedure, Article 413
Louisiana Code of Criminal Procedure, Article 648
Louisiana Code of Criminal Procedure, Article 652
Louisiana Revised Statute 14:30
Louisiana Revised Statute 14.30.1
Louisiana Revised Statute 14.31

STATEMENT OF THE CASE

The Louisiana Supreme Court has decided important questions of federal law that have not been, but should be, settled by this Court. The decisions by the Louisiana Supreme Court conflict with the relevant decisions of this Court in *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), and in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).

Additionally, the decisions by the Louisiana Supreme Court conflict with the decisions of the United States Court of Appeals, Eleventh Circuit, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), and in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984). Further, the United States Court of Appeals, Fifth Circuit, has entered a decision in *United States v. Cronn*, 717 F.2d 164 (5th Cir. 1983) which conflicts with the decisions of United States Court of Appeals, Eleventh Circuit, in *Bowen* and *Sneed*.

From the beginning, defendant, Terry Campbell, a white man, has objected that the indictment charging him was constitutionally defective. Defendant asserted that the grand jury foreman selection process *as applied* in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clause and also violated defendant's due process and fair cross-section rights. It is uncontested by the state and acknowledged by the trial judge that the prior thirty-five grand jury foremen selected over a sixteen and a half year period had all been white. On this issue, the very narrow question presented to this Court is whether a white criminal defendant has standing to raise equal protection claims and due process/fair cross-section claims when blacks are systematically excluded from selection as grand jury foremen.

The trial court denied defendant's *Motion to Quash Grand Jury Indictment* holding that defendant had no standing to raise race-based constitutional claims because defendant is white. On appeal, the Louisiana Court of Appeal, Third Circuit, rendered a judgment overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims. Without addressing defendant's other claims on appeal, the Louisiana Court of Appeal remanded the case with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights. However, the Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit, holding that a white defendant had no standing to raise race-based constitutional claims. Defendant then filed a Petition for Writ of Certiorari to this Court. The state, in its *Brief in Opposition* argued primarily that defendant's petition was premature. This Court denied defendant's writ on May 13, 1996, in

docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature.

The Louisiana Court of Appeal, Third Circuit, and the Louisiana Supreme Court have since ruled on defendant's remaining issues on appeal and the case is now ripe for hearing by this Court.

Of the remaining issues now ruled upon, defendant raises four for review by this Court. Defendant objects to the use of statements obtained from him in violation of his Fifth Amendment right to remain silent and Sixth Amendment right to counsel. Said statements were obtained by law enforcement officers after they had been specifically ordered by the trial court not to question defendant.

Defendant was further denied due process of law when the trial court applied an unconstitutionally high standard and held that defendant was competent to stand trial and later ruled that defendant did not prove by a preponderance of the evidence that he was legally insane at the time of the killing.

Defendant was also denied due process of law when the trial court gave the jury improper instructions which did not require that criminal intent exist at the time of criminal acts.

Finally, defendant was denied due process of law and his Sixth Amendment right to a fair trial when the trial court gave the jury an inadequate definition of manslaughter.

I. BACKGROUND

Defendant, Terry Campbell, suffered a head injury on August 6, 1986, resulting in the physical destruction and surgical removal of portions of his brain. Defendant was arrested on January 11, 1992. Shortly thereafter, an indictment alleging one count of second degree murder was returned against defendant by a grand jury which was selected in an unconstitutional manner.

Defendant was arrested at Cypress Mental Hospital in Lafayette, Louisiana, booked into the Lafayette Parish jail and transported back to the Evangeline Parish jail by Police Chief Deshotel and Deputy Aucoin. Both officers had been specifically ordered by the trial court to not question defendant. Both officers

were aware that defendant had a mental defect. Yet during the approximately hour long ride back to Evangeline Parish, the officers carried on a conversation with defendant even after defendant had invoked his *Miranda* rights. The officers obtained statements from defendant which formed the cornerstone of the state's case.

The underlying problem in this case is defendant's mental condition and defect. In 1986, defendant suffered a serious head injury which necessitated surgery and excision of part of his brain. As a result, defendant's physical injury produced symptoms including loss of memory, headaches, and seizures. Defendant's treating physicians labeled his resulting mental defect as organic brain syndrome and explained that defendant could not think straight or in a reasonable way. The evidence adduced at trial showed that the experts produced by defendant were all very familiar with defendant's medical condition. The experts produced by the state agreed that defense experts would be in a better position to evaluate defendant. Despite the evidence adduced at trial, both the jury and the trial court ruled that defendant was not insane at the time of the killing.

II. PRIOR RULINGS

A hearing was held on December 2, 1993, on defendant's *Motion to Quash Grand Jury Indictment* in the Thirteenth Judicial District Court before the Honorable Preston M. Aucoin, District Judge. Said motion and hearing raised the issues of constitutional defects in the indictment relating to the grand jury foreman selection process as applied in Evangeline Parish. Defendant argued both his equal protection claim and his due process/fair cross-section claim. The transcript of the hearing is included in the appendix beginning at page G-1. In the judgment rendered on December 2, 1993, and signed on December 6, 1993, the Honorable Preston N. Aucoin denied defendant's motion to quash. The judgment is included in the appendix beginning at page H-1. The trial Judge held that defendant had no standing to raise race-based constitutional claims because defendant is white. In ruling, the trial Judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant, Campbell. Again I am restricting all of my comments to this one particular case that we're here on this morning.
>
> This Court rules that the Defendant, Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant, Campbell, has no standing to raise that issue. That being the case the court need not consider other issues. The Motion to Quash the indictment is denied.

See the appendix at page G-37.

The defendant contemporaneously objected to the trial Judge's ruling. See the appendix at page G-38.

Trial on the merits began on December 6, 1993, and ended in mistrial on January 12, 1994. Re-trial began on May 9, 1994. The jury returned a verdict of guilty of second degree murder against defendant on May 12, 1994.

Prior to sentencing, defendant timely filed a *Motion for New Trial* wherein defendant again raised the issue of his indictment which was returned by an unconstitutionally selected grand jury. The *Motion for New Trial* is included in the appendix beginning at page I-1. The motion was denied. The transcript of the denial of the *Motion for New Trial* is included in the appendix beginning at page J-1.

Defendant, in his appeal to the Louisiana Court of Appeal, Third Circuit, urged eleven assignments of error. The *Assignments of Error* filed by defendant in his appeal is included in the appendix beginning at page N-1. Assignment of error number one asserted that:

> [t]he trial court erred in overruling the Motion to Quash Grand Jury Indictment because Defendant was charged with a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected and that the grand jury foreperson selection

process in Evangeline Parish was discriminatory and in violation of Louisiana and United States Constitutional Provisions.

In defendant's brief and at oral argument, defendant raised both his equal protection and due process/fair cross-section claims.

The state neither filed a brief in the appeal nor appeared for oral argument.

Without addressing the other issues raised by defendant, the Louisiana Court of Appeal, Third Circuit, rendered a judgment dated March 1, 1995, overturning the trial court's ruling that defendant had no standing to raise race-based constitutional claims because defendant was white. The opinion of the Louisiana Court of Appeal, Third Circuit, is included in the appendix beginning at page D-2. The Court of Appeal remanded the case to the Thirteenth Judicial District Court with instructions to have a hearing and make a determination whether the grand jury foreman selection process in Evangeline Parish violated defendant's constitutional rights.

The state prepared and filed an *Application for Writ of Certiorari or Review to the Court of Appeal, Third Circuit* with the Louisiana Supreme Court. The defendant prepared and filed an *Opposition to Application for Writ of Certiorari or Review*. The Louisiana Supreme Court granted the state's writ and reversed the decision of the Louisiana Court of Appeal, Third Circuit. The judgment and opinion rendered by the Louisiana Supreme Court is included in the appendix beginning at page A-1. The Louisiana Supreme Court held in its opinion that a white defendant had no standing to raise race-based constitutional claims:

> Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not one of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby* defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that if discrimination in the appointment of an individual to that post

> significantly invades the distinctive interest of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. . . . Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

See the appendix at page A-9.

At this point, defendant was faced with a dilemma. Because the Louisiana Court of Appeal, Third Circuit, and subsequently the Louisiana Supreme Court had only ruled on one issue, it was unclear whether that one issue would then be ripe for review by the United States Supreme Court. Out of an abundance of caution, defendant prepared and filed an *Application for Writ of Certiorari* with this Court raising the single issue of the grand jury foremen selection process. The state, through the office of the Attorney General, filed a *Respondent's Brief in Opposition to Petition for Writ of Certiorari* arguing primarily that defendant's application for writ was premature based on *Flynt v. Ohio*, 451 U.S. 619, 101 S.Ct. 1958, 68 L.Ed.2d 489, (1981) and *Cox Broadcasting Corp v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed. 328, (1975). This Court denied defendant's writ on May 13, 1996, in docket number 95-1240, without comment whether the denial was on the merits or because the petition was premature. See the appendix at page C-1.

Subsequently, on March 13, 1996, the Louisiana Court of Appeal, Third Circuit, ruled on defendant's remaining issues on appeal, some of which are raised in this *Petition for a Writ of Certiorari*. See appendix at page E-1. The Louisiana Court of Appeal, Third Circuit, also denied defendant's Application for Rehearing on June 7, 1996. See appendix at page L-1.

The Louisiana Supreme Court, in a decision dated January 10, 1997, denied defendant's writ. See the appendix at page B-1.

Defendant has exhausted state remedies and the case is now ripe for hearing by this Court.

Defendant has raised the issues of discrimination in the grand jury foreman selection process at all stages starting with a pre-trial *Motion to Quash Grand Jury Indictment*, and by raising

the issue in a timely *Motion for New Trial*, and by urging an assignment of error in his appeal to the Louisiana Court of Appeal, Third Circuit, and in his reply to the state's application for writ to the Louisiana Supreme Court. Defendant has at all times preserved this issue. Similarly, defendant has continually raised and preserved the remaining four issues in this application for writ.

REASONS FOR GRANTING CERTIORARI

This case involves constitutional issues of substantial importance to criminal jurisprudence which this Court has not addressed and which the Louisiana Supreme Court has decided in a way that conflicts with relevant decisions of this Court. In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), this Court held that a black criminal defendant is deprived of his due process and equal protection rights when there was a systemic exclusion of blacks from the grand jury that indicted him and the petit jury that convicted him. And in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), this Court held that under the equal protection clause, a criminal defendant may object to race-based exclusions of petit jurors through preemptory challenges whether or not the defendant and the excluded jurors share the same race.

Further, the decision by the Louisiana Supreme Court directly conflicts with the decisions entered by the United States Court of Appeals, Eleventh Circuit. And finally, there is a split in the circuits on this issue. The United States Court of Appeals, Fifth Circuit, has entered a decision which directly conflicts with the decisions entered by the Eleventh Circuit.

The Louisiana Supreme Court ruled that a defendant does not have standing to bring an equal protection claim challenging exclusion of blacks from serving as grand jury foremen when the defendant is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. *State v. Campbell*, 95-0824, p. 4 (La. 10/2/95); 661 So.2d 1321, 1324. The United States Supreme Court has not ruled on the precise question of whether a white defendant has standing to object on equal protection grounds to the exclusion of blacks as grand jury

foremen. However, in *Powers* the United States Supreme Court held that "a defendant in a criminal case can raise the third-party equal protection claims of [petit] jurors excluded by the prosecution because of their race." *Powers*, 499 U.S. at 415, 111 S.Ct. at 1373.

The Louisiana Supreme Court further ruled that, under *Hobby v. United States*, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), a white defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen because the role of the grand jury foreman in Louisiana is ministerial. *State v. Campbell*, 95-0824, p. 4-5 (La. 10/2/95); 661 So.2d 1321, 1324. That holding by the Louisiana Supreme Court misapplies the holding and reasoning of *Hobby*. The United States Supreme Court distinguished the case of *Rose v. Mitchell*, stating that:

> Moreover, *Rose* must be read in light of the method used in Tennessee to select a grand jury and its foreman. Under that system, 12 members of the grand jury were selected at random by the jury commissioners from a list of qualified potential jurors. The foreman, however, was separately appointed by a judge from the general eligible population at large. The foreman then served as "'the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members there-of.'" *Rose v. Mitchell, supra*, at 548, n. 2, 99 S.Ct., at 2996, n. 2 (quoting Tenn. Code Ann. § 40-1506 (Supp.1978)). The foreman selection process in *Rose* therefore determined not only who would serve as presiding officer, but also who would serve as the 13th voting member of the grand jury. The result of discrimination in foreman selection under the Tennessee system was that 1 of the 13 grand jurors had been selected as a voting member in an impermissible fashion. Under the federal system, by contrast, the foreman is chosen from among the members of the grand jury after they have been empaneled, see Fed.Rule Crim.Proc. 6(c); the federal foreman, unlike the foreman in *Rose*, cannot be viewed as the surrogate of the judge. **So long as the grand jury**

> **itself is properly constituted, there is no risk that the appointment of any one of its members as foreman will distort the overall composition of the array or otherwise taint the operation of the judicial process.**

Hobby v. United States, 468 U.S. at 347-48, 104 S.Ct. at 3098. (Emphasis added.)

In *Hobby*, the federal grand jury foreman is selected from a properly constituted grand jury. The selection process in Evangeline Parish is similar to that used *Rose*. Pursuant to Louisiana Code of Criminal Procedure, Article 413:

> the grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors selected or drawn from the grand jury venire. In parishes other than Orleans, the *Court shall select one person from the grand jury venire to serve as foreman of the grand jury*. The Sheriff shall draw indiscriminately by lot from the envelope containing the remaining names of the grand jury venire a sufficient number of names to complete the grand jury. (Emphasis added.)

As in *Rose*, the Louisiana trial judge selects one voting member of the grand jury. And the discrimination in the selection of the foreman distorts the composition of the resulting grand jury thereby tainting the whole.

Therefore, the reliance by the Louisiana Supreme Court on *Hobby* is inappropriate in light of the above distinction drawn by the United States Supreme Court between *Hobby* and *Rose*.

The decision by the Louisiana Supreme Court that a white defendant has no standing to raise the equal protection claim that blacks were excluded from selection as grand jury foreman is also in conflict with decisions by the United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (11th Cir. 1984), *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), *United States v. Holman*, 680 F.2d 1340, (11th Cir. 1982), and *United States v. Perez-Hernandez*, 672 F.2d 1380, (11th Cir. 1982) (per curiam). The United States Court of Appeals, Eleventh Circuit, has steadfastly ruled that the fact that the defendant is not a member of the underrepresented group does not deprive him of standing to

bring a claim of denial of equal protection and exclusion of other groups from serving as grand jury foremen even though he was not of that race (or gender).

The decisions by the United States Court of Appeals, Eleventh Circuit, conflict with the decision entered by the United States Court of Appeals, Fifth Circuit, in *United States v. Cronn*, 717 F.2d 164 (1983). There, the Fifth Circuit, held that "equal protection considerations are not involved in the claim of a white male not to have females and racial minorities excluded from the judicial process as it is applied to him." *United States v. Cronn*, 717 F.2d at 169.

Alternatively, this Court should grant certiorari to address the issue that the Louisiana law on present sanity (capacity to proceed), Code of Criminal Procedure, Article 648A, is the standard held unconstitutional by this Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996).

ARGUMENT

I. HISTORY OF TOTAL EXCLUSION OF BLACKS AS GRAND JURY FOREMEN

Defendant, prior to the trial on the merits in his case, filed a *Motion to Quash Grand Jury Indictment* wherein he objected that the indictment against him was constitutionally defective in that the manner of selection of grand jury foremen was illegal. More specifically, defendant asserted that the grand jury foreman selection process as applied in Evangeline Parish excluded blacks and was discriminatory and violated the equal protection clauses of both the United States Constitution and the Louisiana Constitution. Additionally, defendant argued that the grand jury foreman selection process violated his due process and fair cross-section rights guaranteed by the United States Constitution and the Louisiana Constitution.

For a period from January of 1976 through August of 1993, thirty-five white grand jury forepersons had been selected in Evangeline Parish where approximately twenty-three percent of the registered voters were black. Defendant's evidence covered a

sixteen and a half year period. In *Guice v. Fortenberry*, 722 F.2d 276, 280 (5th Cir. 1984), and *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991), the period of time that the United States Court of Appeals, Fifth Circuit, found relevant was fifteen years.

At the hearing held on December 2, 1993, defendant introduced evidence establishing proportions of blacks in Evangeline Parish for the prior sixteen and one-half year period. Defendant's population statistics were taken from the registered voter lists of Evangeline Parish for 1976 through 1993. Defendant's data is summarized as follows:

Date	Total	White	Black	Blacks as a % of Total
3/31/76	20,059	15,749	4,310	21.49
3/31/77	20,309	15,958	4,351	21.42
3/31/78	19,671	15,455	4,216	21.43
3/31/79	20,097	15,732	4,365	21.72
3/31/80	21,818	17,093	4,725	21.66
3/31/81	21,592	16,907	4,685	21.70
3/31/82	20,938	16,347	4,561	21.93
3/31/83	21,499	16,722	4,777	22.22
3/31/84	22,266	17,139	5,124	23.01
3/31/85	21,446	16,391	5,048	23.54
3/31/86	21,123	16,120	5,003	23.69
3/31/87	21,726	16,501	5,220	24.03
3/24/88	21,542	16,287	5,251	24.38
4/01/89	21,192	15,882	5,300	25.01
3/09/90	21,274	15,888	5,376	25.27
2/15/91	21,963	16,469	5,480	24.95
3/31/92	21,817	16,270	5,532	25.54
2/12/93	21,920	16,390	5,511	25.51

Defendant established that during the period, no black person had ever been selected as a grand jury foreman. It was uncontested at the December 2, 1993, hearing and in all subsequent proceedings that the prior thirty-five grand jury foremen over a sixteen and one-half year period had all been white. **This fact was**

admitted not only by the state but also acknowledged by the trial judge.

The fact that zero grand jury foremen were black is compelling. "While 'statistics are not, of course, the whole answer, . . . nothing is as emphatic as zero.'" *Johnson v. Puckett*, 929 F.2d 1067, 1073 (5th Cir. 1991)(quoting *Guice v. Fortenberry*, 661 F.2d 496, 505 (5th cir. 1981)(en banc), quoting *United States v. Hinds County School Board*, 417 F.2d 852, 858 (5th Cir. 1969)). The chances of randomly picking a white person thirty-five consecutive times given the population distribution of Evangeline Parish is less than one in ten thousand.

Equal Protection Violation

The United States Supreme Court initially set out a three step test to determine whether a defendant establishes a *prima facie* case of discrimination in an equal protection claim in *Castaneda v. Partida*, 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977). And in *Rose v. Mitchell*, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 739 (1979), the United States Supreme Court applied the three step process for establishing a *prima facie* case of discrimination in the context of grand jury foreman selection:

> That is, "in order to show that an equal protection violation has occurred in the context of grand jury [foreman] selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." *Castaneda v. Partida*, 430 U.S., at 494, 97 S.Ct., at 1280. Specifically, respondents were required to prove their prima facie case with regard to the foreman as follows:
>
> > "The first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve as [foreman], over a significant period of time. . . . This method of

> proof, sometimes called the 'rule of exclusion,' has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing." *Ibid.*
>
> Only if respondents established a prima facie case of discrimination in the selection of the foreman in accord with this approach, did the burden shift to the State to rebut that prima facie case. *Id.*, at 495, 97 S.Ct., at 1280.

Rose v. Mitchell, 443 U.S. at 565, 99 S.Ct. at 3005.

In *Rose*, the United States Supreme Court held that racial discrimination in the selection of grand jury foremen violates the Fourteenth Amendment to the United States Constitution and requires reversal of a state conviction. In fact,

> where sufficient proof of discrimination in violation of the Fourteenth Amendment has been made out and not rebutted, [the Supreme Court] uniformly has required that the conviction be set aside, and the indictment returned by the unconstitutionally constituted grand jury be quashed.

Rose v. Mitchell, 443 U.S. at 551, 99 S.Ct. at 2998 (citations omitted). "[S]uch discrimination compels voiding the indictments and convictions." *Guice v. Fortenberry*, 722 F.2d 276, 282 (5th Cir. 1984).

Although earlier jurisprudence was less than clear on the issue, the United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), clarified that a criminal defendant does have standing to bring an equal protection claim where the issue raised is the rights of others excluded from participation in the judicial process. *Powers* held that, in the context of peremptory challenges of petit jurors, under the equal protection clause, a criminal defendant has standing to objection to race-based exclusions whether or not the defendant and those excluded share the same race.

A reading of the transcript of the argument at the December 2, 1993, hearing and of the trial court's ruling shows that the trial court improperly relied upon the federal case of *Hobby v. United*

States, 468 U.S. 339, 104 S.Ct. 3093, 82 L.Ed.2d 260 (1984), in reaching its holding that defendant had no standing to raise his constitutional claims.

Defendant also has standing to raise his due process/fair cross-section claims. Defendant's race is irrelevant in deciding whether he has been denied fundamental fairness as guaranteed to him by the due process clause. The other question here is whether the composition of the grand jury met the Sixth Amendment's fair cross-section requirements when one member of the grand jury was selected in a discriminatory manner.

The first step of the *Castaneda* test is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws as written or as applied. *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. The confusion on the issue of standing in the state's argument and the trial court's ruling arises from its misidentification of the term "group." The state contends that "group" includes the defendant. The ruling by the Louisiana Supreme Court is also based in part on this same misidentification. In many of the early equal protection cases such as *Castaneda v. Partida* and *Rose v. Mitchell*, often the defendant was a member of the same minority group that was being excluded in some manner. In *Castaneda v. Partida,* the excluded group and the defendant were Mexican-American; in *Rose v. Mitchell* the excluded group and the defendant were black. The Authors of those opinions, therefore, had no reason to draw a distinction between the race of the criminal defendant and the race of the excluded class. But as *Powers* points out, the essence of this type of third party claim is that the rights of the excluded class are being raised by the criminal defendant. When analyzed properly, the "group" referred to is that of the excluded class, in this case blacks excluded as grand jury foremen in Evangeline Parish. The United States Court of Appeals, Eleventh Circuit, in *United States v. Sneed*, 729 F.2d 1333 (1984), had no problem in recognizing that the defendant need not be a member of the underrepresented or excluded group when raising an equal protection claim of discrimination in the selection process of grand jury foremen.

The group excluded from selection as grand jury foremen is blacks. This is a group that is "a recognizable, distinct class,

singled out for different treatment under the laws, as written or as applied." *Rose v. Mitchell*, 443 U.S. at 565, 99 S.Ct. at 3005. As the United States Court of Appeals, Fifth Circuit, has already noted, "[b]lacks compromise a distinct class capable of being singled out for different treatment under the laws." *Johnson v. Puckett*, 929 F.2d 1067, 1072 (5th Cir. 1991). Indeed, in *James v. Whitley*, 39 F.3d 607, 609 (5th Cir. 1994), a case involving issues similar to the case *sub judice*, the state conceded that the petitioner had established that blacks are a recognizable distinct class that receives different treatment under the laws as written or applied.

In its analysis in *Powers*, the United States Supreme Court noted that the discriminatory use of preemptory challenges causes the defendant cognizable injury and he has a concrete interest in challenging the practice because racial discrimination in jury selection casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. Second, the relationship between the defendant and excluded jurors is such that the defendant is fully as effective a proponent of their rights as they themselves would be since both have a common interest in eliminating racial discrimination from the courtroom and there can be no doubt that the defendant will be a motivated, effective advocate because proof of a jury selected in a discriminatory manner may lead to the reversal of the conviction under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Third, it is unlikely that a juror dismissed because of race will possess sufficient incentive to set in motion the arduous process needed to vindicate his own rights. Thus, the fact that a criminal defendant's race differs from that of the excluded jurors is irrelevant to his standing to object to the discriminatory use of preemptorys.

Identical logic applies to the present defendant's claim of discrimination in selection of grand jury foremen. First, the defendant here is caused a cognizable injury when discrimination in selection of grand jury foremen casts doubt on the integrity of the judicial process and places the fairness of the criminal proceeding in doubt. The defendant here has the concrete interest in challenging such a practice. Secondly, the relationship between this defendant and those excluded from selection as grand jury

foremen in Evangeline Parish is identical to the relationship between the defendant in *Powers* and the excluded petit jurors. Both defendants Campbell and Powers would be effective proponents of the rights of the excluded members and both would have a common interest in eliminating racial discrimination in the courtroom. And finally, it is equally as unlikely in the context of the grand jury foreman selection process in Evangeline Parish that a minority excluded from selection as a grand jury foreman would be likely to posses sufficient incentive to set in motion a suit to vindicate his rights.

Therefore, as in *Powers*, the fact that defendant's race differs from that of the excluded members is irrelevant to the analysis of his standing to object to the discriminatory practice in question.

Due Process and Fair Cross-Section Violation

In addition to his equal protection claim, the defendant has raised and continues to raise the issue of violation of the rights guaranteed to him under the due process clauses of the United States Constitution and Louisiana Constitution and the fair cross-section clause of the Sixth Amendment. Defendant asserts that by selecting a grand jury foreman in the discriminatory fashion, the entire grand jury was tainted as a result. *Guice v. Fortenberry*, 661 F.2d 496 (5th Cir. 1981)(en banc), echoed the proposition that "[i]f convictions must be set aside because of taint of the grand jury, we see no reason to differentiate the result because discrimination effected only the foreman." *Guice v. Fortenberry*, 661 F.2d at 499. Defendant's races is in no way relevant to his standing to raise these claims. A grand jury chosen in a discriminatory manner can not be said to be unqualified to indict a black man but qualified to indict a white man.

II. ILLEGALLY OBTAINED STATEMENTS

The trial court erred in overruling defendant's written *Motion to Suppress Inculpatory Statements* and *Supplemental Motion to Suppress* and the trial Court erred in ruling during the

course of the trial on defendant's oral *Motion to Suppress Inculpatory Statements* (which was renewed during the course of the trial) and the expanded oral *Motion to Suppress Inculpatory Statements* (which was made on the grounds that the warrant was issued without probable cause).

Defendant, by written motion filed May 28, 1992, entitled *Motion to Suppress Inculpatory Statements*, moved to suppress five separate statements made by defendant to Pine Prairie Chief of Police L. C. Deshotel and Evangeline Parish Sheriff's Deputy Jack Aucoin on January 11, 1992. Defendant alleged as grounds for suppression that said statements were obtained in violation of rights guaranteed to him under the Fifth Amendment of the United States Constitution and his rights under the *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) decision. Additionally, defendant asserts that the statements were taken in direct violation of his rights guaranteed by Article I, section 13 of the Louisiana Constitution of 1974, which mirror those rights of the defendant under the Fifth and Sixth Amendments of the United States Constitution.

Fifth Amendment Violation

The Fifth Amendment of the United States Constitution provides that "no person ... shall be compelled in any criminal case to be a witness against himself." The landmark case of *Miranda v. Arizona*, held that no defendant may be questioned until he has been "read his rights." Among those rights is the right to remain silent.

Defendant was arrested at Cypress Mental Hospital in Lafayette, Louisiana, on January 11, 1992. Defendant was then taken to the Lafayette Parish jail and booked. Immediately thereafter, Police Chief Deshotel and Deputy Aucoin received defendant and transported him back to the Evangeline Parish jail. Both Police Chief L. C. Deshotel and Evangeline Parish Sheriff's Deputy Jack Aucoin testified that the defendant was read his *Miranda* rights prior to the drive back to Evangeline Parish. Deputy Jack Aucoin testified that defendant did indeed invoke his right to remain silent. The statements were obtained during the drive back

to Evangeline Parish after defendant invoked his right to remain silent.

The trial Judge was also the same Judge who signed the arrest warrant and who noted for the record that he specifically ordered the police officers not to question defendant. Deputy Aucoin testified that he heard Police Chief Deshotel's description of defendant as having a mental defect and that he understood the Judge's order to not question the defendant.

Neither Police Chief Deshotel nor Deputy Aucoin testified that the defendant made an explicit oral waiver of his right to remain silent. No written waiver of a right to remain silent was produced or introduced into evidence.

Both Chief Deshotel and Deputy Aucoin were aware or should have been aware that defendant could not make a knowing, intelligent and voluntary waiver of his right to remain silent due to his mental disease or defect. Chief Deshotel testified of knowing of defendant's mental defect. Chief Deshotel specifically told Judge Aucoin about the mental defect in the presence of Deputy Aucoin.

Plainly stated, defendant invoked his right to remain silent. As a result of his physical injury and mental condition the defendant could not have understood, remembered, or waived his constitutional rights at the time the statements were made.

Sixth Amendment Violation

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

The United States Supreme Court in *Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977), *rehearing denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 240, held that a defendant's right to counsel was violated when officers transporting the defendant interrogated the him despite an agreement with the his counsel to not question him. The Sixth Amendment right to counsel is broader than the Fifth Amendment right against self incrimination. Once the defendant has an attorney, the sole contact between the state and the defendant should be through defendant's counsel. In fact, the state has an affirmative duty to not interact

with the defendant except through his counsel.

As part of the arrest warrant, the trial court ordered that attorney Gary Ortego be appointed for defendant immediately. Both Police Chief Deshotel and Deputy Aucoin were aware of the order appointing attorney Gary Ortego to represent defendant. Neither officer took actions to contact Mr. Ortego. In fact, Deputy Aucoin specifically knew how to contact Mr. Ortego and took no steps to do so.

Although the defendant was informed of his right to have an attorney appointed, neither Police Chief Deshotel or Deputy Aucoin informed defendant that an attorney had already been appointed.

Actual Prejudice

The actual prejudice to defendant by the admissions of the five statements obtained in violation of his Fifth and Sixth Amendment rights is manifested by the fact that the statements were the prosecution's evidence connecting the defendant with the scene of the crime. No eyewitness placed defendant at the scene of the crime. Absent such a crucial bit of evidence, the state's case would have collapsed.

The uncontradicted evidence shows that, after invoking his right to remain silent, defendant was confined with law enforcement officers for an extended period in closed quarters and that the officers carried on a conversation with defendant. The United States Constitution requires in such a situation that questioning, of whatever nature, be terminated. Without some intervening event, or period of time, any questioning of or statements by defendant after the invocation of his right to remain silent can not be admissible.

The trial court appointed an attorney for defendant. The trial court specifically advised the law enforcement officers involved that the attorney had been appointed and that they should not question defendant. The trial court could not have made a more explicit statement to the law enforcement officers to refrain from the exact conduct in which they engaged.

III. SANITY

Competency to Proceed

The trial court violated defendant's due process rights when it applied an improper standard to determine whether defendant had capacity to proceed. Whether the trial court applied the standard in the Louisiana Code of Criminal Procedure, Article 648 (criminal prosecution shall be resumed unless the court determines **by clear and convincing evidence** that the defendant does not have the mental capacity to proceed) or the standard enunciated by the Louisiana Court of Appeal, Third Circuit, in its ruling in this case (the defendant bears the burden of proving by a clear preponderance reasonable grounds for the Judge to believe that he is mentally defective . . . . *State v. Vincent*, 338 So.2d 1376 (La. 1976)). Either standard is unconstitutional in light of the subsequent ruling by this Court on April 16, 1996, in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996). Louisiana's rules allow the state to put on trial a defendant who is more likely that not incompetent. Such rules are incompatible with the dictates of due process and were found unconstitutional and unacceptable by this Court in *Cooper*.

Insanity at the Time of the Offense

The second ground asserted in the *Motion for New Trial* and the second ground in the *Motion for Post Verdict Judgment of Acquittal* are that clearly the preponderance of evidence establishes the defense of insanity at the time of the offense-that is, that the circumstances indicate that because of a mental disease or defect the defendant was incapable of distinguishing between right and wrong with reference to the conduct in question.

The jury returned a verdict of guilty of second degree murder and implicitly found defendant to be legally sane. However, the evidence adduced at trial from both experts and lay witnesses called by the defendant, by the state and appointed by the trial court, even when viewed in the light most favorable to the prosecution, shows that no rational finder of fact could have

concluded beyond a reasonable doubt that defendant was more likely that not sane on January 11, 1992. Defendant was legally insane and has been unconstitutionally convicted because the evidence was insufficient to support a finding of guilty as charged.

The state must prove each element of a charged crime beyond a reasonable doubt in order to obtain a conviction. *State v. Noble*, 425 So.2d 734, 735 (La. 1983) citing *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). An adult defendant successfully rebuts the legal presumption of sanity at the time of the offense when he proves the defense of insanity by a preponderance of the evidence. Louisiana Code of Criminal Procedure, Article 652. Under the *Jackson* standard of the appellate review, *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979), adopted by the Supreme Court of Louisiana, *State v. Roy*, 395 So.2d 664, 667 (La. 1981), the evidence when viewed in the light most favorable to the state must show *beyond a reasonable doubt* that the defendant has not established the defense of insanity by a preponderance of the evidence for a conviction to be upheld. *State v. Nealy*, 450 So.2d 634, 639 (La. 1984) (citations omitted); *State v. Price*, 403 So.2d 660, 662 (La. 1981); *State v. Smith*, 461 So.2d 1155, 1158 (La. App. 3rd Cir. 1984).

Proof at Trial

Nine doctors and/or mental health experts provided evidence at the trial. Four of those experts concluded that the defendant was legally insane on January 11, 1992, the date of the shooting. All experts agreed that defendant had a mental defect when they examined him at times ranging from a few days after the killing to as much as a couple of years later. Additionally, all experts agreed that defendant had the same mental defect at the time of the killing.

As a consequence of defendant's injury and the resulting mental effects, defendant was originally found incompetent to assist counsel at trial by Dr. Fontenot, a member of the sanity commission appointed by the trial court. The other member of the sanity commission, Dr. Landry, testified that "I felt that his attorney

might be at a disadvantage in putting up a defense for him based on what, at least in my office, seemed to be pretty profound memory problems." Defendant's injury was not one such that it would get better with time. As Dr. Landry testified defendant's "prognosis was poor based on his organic deficits. Bottom line is that you generally can't fix those sort of damaged brain cells."

That the defendant suffered a physical injury was shown by the testimony at trial of James Fontenot, who was present during the injury to defendant on August 6, 1986, and of Dr. Harper, a neurologist, who had been treating defendant. The fact that there was a physical injury was not disputed by the state.

Defendant's physical injury produced mental defects as described by witnesses for the defense. Dr. Jimmy D. Cole testified about defendant's loss of memory of the original injury. Dr. Cole also described defendant's symptoms as including loss of memory, headaches, and trouble with seizures. Dr. Cole labeled defendant's mental defect as organic brain syndrome. Dr. Cole explained that this meant that defendant can not think straight or think in a reasonable way to solve problems as he did before.

Additionally, Dr. Cole testified that defendant began exhibiting signs of depression. Dr. Cole testified that on January 7, 1992, five days before the killing, defendant came in "as depressed as I have ever seen him." He was despondent, tearful and was again having suicidal feelings.

Dr. Lecorgne described defendant as having "a tendency to become highly emotionally aroused without due regard for the boundaries of external reality, or due regard for the consequences of his behavior." And as having "emotional instability, including swinging from a relatively normal mood to outbursts of aggression or anger that are totally out of proportion to what is going on around him ... Thus, as a consequence of the brain injury it was determined that Mr. Campbell's behavior is subject to sudden and rapid breakdown under conditions of stress and his available coping skills are significantly limited."

On cross-examination by the state, Dr. Lecorgne testified that "what I know about the condition [defendant] has says that once his arousal, if indeed this is exactly what happened, once that arousal of emotions and behavior occurred he was like a run away

locomotive with no ability to control, restrain, or stop himself and that is what my test showed and that is what is very comforting and reassuring to hear a medical doctor's films corroborate."

Dr. Cloyd testified that "such people are especially vulnerable to physical or psycho-social stresses, problems this and often with immaturity-emotional immaturity in handling things."

Dr. Paul Ware testified that "there is absolutely no question and I have not heard anyone disagree with the fact that [defendant] has both a mental disease and a mental defect." Dr. Ware went on to testify that "in my opinion that there is no question that his mental disease or defect did interfere significantly with his ability to determine right from wrong at the time in question and that he did not have the mental ability or capacity to distinguish right from wrong."

Additional weight was given to Dr. Cloyd's and Dr. Ware's testimony when they testified that in all of their past examinations they have rarely found a defendant to be legally insane. Dr. Cloyd testified that he has evaluated people over 100 times to see if they meet the legal definition of insanity and this is only the second time that he has ever found that someone could not tell right from wrong. Dr. Ware testified that of the approximately 2,500 sanity commission evaluations he has been on, the percentage that he felt was not guilty by reason of insanity has been less than one percent.

No expert examining defendant found any deception on his part. Testifying on behalf of the defense, Dr. Cole said that he believes defendant was being truthful about the accident and his symptoms. Dr. Lecorgne testified that defendant was being truthful with him, and that there was no malingering or conscious deception involved. Dr. Cloyd testified that he found no evidence even suggestive of malingering.

This conclusion was supported by the experts who testified on behalf of the state. Dr. Gibson said that defendant certainly seemed credible and that he (Dr. Gibson) believed defendant. No expert witness testified that they believed defendant to be deceptive or malingering.

Four experts testified on behalf of the state. The first, Dr. Charles Fontenot, a physician, was appointed as a member of the sanity commission. Dr. Fontenot originally recommended that

defendant not stand trial "because of his mental incompetence." Although Dr. Fontenot testified that the thought defendant was legally sane, he went on to testify that he does not know what the legal definition of sanity is. Dr. Landry, a physician and specialist in psychiatry, was appointed as the second member of the sanity commission. Dr. Landry testified that defendant had significant defects and a brain injury.

Additionally, the state appointed two experts to examine defendant shortly before trial. Dr. Gibson, a psychiatrist, testified that defendant certainly had a mental disease and/or defect and very likely the mental disease and the defect. The state's final expert witness, Dr. Pennington, an M.D. that specializes in psychiatry, did not even conclusively testify that defendant knew the difference between right and wrong on January 11, 1992.

All of the state's experts who were asked which doctors would be in the best position to evaluate defendant testified that those doctors who had treated defendant before and after the killing and at the time of the killing were in the best position to evaluate him. Dr. Landry testified that he thought Dr. Cole would know defendant than him (Landry). Dr. Landry testified that he only saw defendant one time and that was six months after the killing. Dr. Landry testified that he never saw Dr. Cole's records or Cypress Hospital's records. Dr. Gibson testified that his determination of sanity based on an examination on November 15, 1993, would be much more difficult than a determination based on an examination at the time of the killing. Dr. Gibson testified that he only examined defendant for two hours and did not conduct his examination until about November 15, 1993, eighteen months afterwards. Dr. Gibson testified that it is better to examine someone as close as possible to the time of occurrence of the event which is in question. Dr. Pennington testified that defendant's treating team consisting of Dr. Cole and Dr. Cloyd would be in a better position to determine defendant's mental condition on January 11, 1992, than he would be. Dr. Pennington additionally testified that his examination only consisted of a one-on-one interview lasting about an hour and fifteen minutes on November 17, 1993.

A defendant is denied due process of law if the trior of fact is "free to find the defendant guilty even when he proves insanity

by preponderance of the evidence." *State v. Roy*, 395 So.2d 664, 667 (La. 1981) (quoting *State v. Poree*, 386 So.2d 1331, 1335 (La. 1980)). The evidence presented at the trial of defendant, when viewed in the light most favorable to the prosecution, was insufficient to show beyond a reasonable doubt that the defendant failed to prove by a preponderance of the evidence that he was legally insane at the time of the shooting. His conviction and sentence on one count of second degree murder violates his due process rights guaranteed to him by the United States Constitution.

On the record of this trial, no rational finder of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was not competent to proceed or that he was insane at the time of the killings.

Only by disregarding in its entirety the testimony of the defendant's witnesses, both lay and experts, and much of the testimony of the witnesses called by the state, in conjunction with application of the unconstitutional higher standards of Louisiana Code of Criminal Procedure, Article 648 and of Louisiana jurisprudence as in *State v. Vincent*, could the jury and trial court reach their conclusions. The defendant was denied due process of law when he was found competent to proceed and because of the trial court's erroneous denial of his *Motion for Post Verdict Judgment of Acquittal*.

IV. LACK OF *MENS REA* AT TIME OF *ACTUS REUS*

The trial court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury. Defendant by written motion requested that an instruction be given which would clarify the ambiguity of exactly when the required criminal intent must exist.

Criminal intent must exist **at the time of** the acts or omissions of the defendant. Louisiana Code of Criminal Procedure, Article 8, provides in part that "[c]riminal conduct consists of: (1) an act or a failure to act that produces criminal consequences, and which is combined with criminal intent."

In the instructions to the jury, the trial court in its discussion of intent stated that:

> [w]ith reference to the crime of murder it is immaterial whether the specific intent or premeditation existed for a brief or great length of time before the killing. It is sufficient that it existed only a moment prior to the commission of the act which resulted in the killing. As to murder, the law indicates no definite time within which a specific intent to kill must be formed so as to make the killing murder. The specific intent may have existed a moment antecedent to the act itself which caused the death, or a day or another period of time.

In the trial court's jury instructions, the requirement that the criminal intent must exist at the same time as the acts of the defendant is entirely absent. In fact, the entire discussion by the trial court is couched in the past tense relative to the acts. The first sentence refers to intent existing "for a brief or great length of time *before* the killing.". Emphasis added. The second sentence again refers to intent existing "prior to the commission of the act." The third sentence only indicates that no definite time is required when the intent is formed. And the fourth and final sentence again refers to the intent existing "a moment antecedent to the act ... or a day or another period of time." None of these instructions require the intent to have existed **at the time of the act**. Taken individually or as a whole, these instructions squarely place the criminal intent requirement before the act, not coincident with the act. The Court of Appeal, Third Circuit, ruled that the trial court's instructions were sufficient. However, at no time did the trial court clearly explain the required temporal connection between the required specific intent and the act.

By not requiring the jury to find criminal intent existing at the time of acts which lead to the killing, defendant was convicted in violation of his due process rights.

V. IMPROPER DEFINITION OF CRIME

Defendant asserts that the trial court erred when it overruled defendant's written objections to the proffered general

jury charges. More specifically, the trial court's charge defining R.S. 14:31, manslaughter, was incomplete and inaccurate and referred to "enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1" when the court's general charge did not specify the enumerated or a non-enumerated felonies nor did the court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

The jury was left with only the choice of finding the defendant guilty of the greater charge of second degree murder. The only guilty verdict the jury could adequately consider was guilty of second degree murder. Consequently, defendant was convicted in violation of his due process rights.

CONCLUSION

This Court should grant certiorari to address the conflicts in the decisions by the Supreme Court of Louisiana, the United States Court of Appeals, Fifth Circuit, and the United States Court of Appeals, Eleventh Circuit, concerning whether a white defendant has standing to object to the rase-based exclusion of grand jury foremen on equal protection and due process/fair cross-section grounds even if not of the same race as those excluded as grand jury foremen, and because the ruling of defendant's capacity to proceed was on the basis of Louisiana Code of Criminal Procedure, Article 648A which is clearly unconstitutional under the holding of the United State Supreme Court in *Cooper v. Oklahoma*, ___ U.S. ___, 116 S.Ct. 1373, ___ L.Ed.2d ___ (1996). Alternatively, this Court should grant certiorari to address other denials of defendant's basic constitutional rights.

Respectfully Submitted,
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The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. NO. 95-K - 0824

TERRY CAMPBELL

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IN RE: State of Louisiana; - Plaintiff(s); Applying for writ of Certiorari and/or Review; to the Court of Appeal, Third Circuit, Number CR 94-1140, CR94-1140; Parish of Evangeline 13th Judicial District Div. "A" Number 45,690

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October 2, 1995

Granted. See per curiam.

CDK
WFM
JCW
HTL
BJJ
JPV

CALOGERO, C.J. not on panel.

DENNIS, J. would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

Supreme Court of Louisiana
October 2, 1995

S/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

Oct 2 1995

No. 95-K-0824
State
Versus
Terry Campbell

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, THIRD CIRCUIT, STATE OF LOUISIANA

S/SDK

PER CURIAM.*

WRIT GRANTED. Defendant was indicted for second degree murder. Prior to trial, defendant filed a Motion to Quash Grand Jury Indictment, alleging the grand jury foreman selection process in Evangeline Parish was discriminatory. The motion was denied. Defendant was later convicted of second degree murder. On appeal, one of defendant's assignments of error asserted the trial court had erred by denying his motion to quash on the basis that he, as a white man, lacked standing to claim discrimination against blacks in the selection of grand jury foremen in Evangeline Parish. The third circuit found defendant had standing to pursue the claim, but did not reach the merits of his claim. The court instead found the statistical information compiled by the defense in support of the claim was incomplete and remanded for further evidence to be adduced.[1]

****Calogero, C.J. not on panel. See Rule IV, Part 2, § 3.***

[1]The court of appeal did not address defendant's remaining assignments of error.

Dennis J., would deny the writ. The majority's opinion is premature and incomplete inasmuch as it is based on an inadequate record and does not address state constitutional law.

The state filed a writ application with this Court, arguing the court of appeal erred in finding defendant had standing to make a discrimination claim on behalf of the excluded black potential grand jury foremen and also that the court of appeal erred in

remanding the case to allow the defendant to put on more evidence. We grant the state's writ application, reverse the court of appeal decision, and remand to the court of appeal for further proceedings.

In Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993 (1979), the United States Supreme Court implicitly held two black defendants had standing to bring an equal protection claim that blacks had been unconstitutionally excluded from serving as grand jury foremen when it "assume[d] without deciding that discrimination with regard to the selection of only the foreman requires that a subsequent conviction be set aside." *Rose,* Id. at 551, n. 4, 99 S.Ct. at 2998, n. 4. Therefore, "in order to show that an equal protection violation has occurred in the context of grand jury ... foreman ... selection, the defendant must show that the procedure employed resulted in substantial underrepresentation of his race or of the identifiable group to which he belongs." Id. at 565, 99 S.Ct. at 3005 (quoting *Castaneda v. Partida,* 430 U.S. at 494, 97 S.Ct. at 1272). Thus, in the context of an equal protection claim with respect to the selection of a grand jury foreman, *Rose* requires the defendant claiming the violation be of the same "race or identifiable group" as those he alleges were excluded from serving as grand jury foremen.

In Hobby v. United States, 468 U.S. 339, 104 S.Ct. 3093 (1984), the Court was faced with determining whether discrimination in the selection of federal grand jury foremen, resulting in the underrepresentation of blacks and women in that position, required reversal of the conviction of a white male defendant. The defendant had argued this discrimination was a violation of his due process right under the Fifth Amendment of the United States Constitution. The Court noted that in *Peters v. Kiff,* 407 U.S. 493, 92 S.Ct. 2163 (1972), a plurality opinion, it had held a person of any race had standing to bring a Due Process Clause claim challenging the exclusion of any group from petit or grand jury service. The *Hobby* Court held that this would not be the case, however, where a defendant was bringing a due process claim challenging the exclusion of a particular group from serving as grand jury foremen.

The Hobby Court held that discrimination in the selection of a grand jury foreman, as opposed from discrimination in the selection of the grand jury itself, did not impede the defendant's due process rights. "[Even] assuming discrimination entered into the selection of federal grand jury foremen, such discrimination does not warrant the reversal of the conviction of, and dismissal of the indictment against, a white male bringing a claim under the Due Process Clause." Id. at 350, 104 S.Ct. at 3099. The Court focused on the fact that the impact of a discriminatorily chosen grand jury foreman, as opposed to the exclusion of certain groups from participation in the petit or grand jury itself, has only an incidental effect on the criminal justice system:

> Given the ministerial nature of the position, discrimination in the selection of one person from among the members of a properly constituted grand jury can have little, if indeed any, appreciable effect upon the defendant's due process right to fundamental fairness. Simply stated, the role of the foreman of a federal grand jury is not so significant to the administration of justice that discrimination in the appointment of that office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment.
>
> Nor does discrimination in the appointment of grand jury foremen impair the defendant's due process interest in assuring that the grand jury includes persons with a range of experiences and perspectives. The due process concern that no "large and identifiable segment of the community [be] excluded from jury service," does not arise when the alleged discrimination pertains only to the selection of a foreman from among the members of a properly constituted federal grand jury. That the grand jury in this case was so properly constituted is not questioned . . . .

> The ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause. Absent an infringement of the fundamental right to fairness that violates due process, there is no basis upon which to reverse petitioner's conviction or dismiss the indictment.

Id. at 345-46, 104 S.Ct. at 3096-97 (citations omitted).
The Court distinguished *Rose* on the basis that it involved an equal protection claim brought by a black defendant claiming discrimination against members of his own race in the selection of the grand jury foreman, as opposed to *Hobby,* where the white defendant brought only a due process challenge.

In this case, defendant alleges violations of both the Equal Protection Clause and the Due Process Clause of the United States and Louisiana Constitutions. The court of appeal in the instant case analogized to *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364 (1991) in support for its holding that a white defendant had standing to bring a due process or equal protection claim attacking the process for selecting grand jury foremen as discriminatory against blacks. In *Powers,* the Court held that a white defendant had standing to raise the equal protection claims of jurors excluded because of their race by the prosecution through the improper use of peremptory challenges. The Court reached this decision after a thorough discussion of the great impact racial discrimination in the selection of jurors would have on the defendant as well as on the integrity of the judicial process. The Court stated:

> The discriminatory use of peremptory challenges by the prosecution causes a criminal defendant cognizable injury, and the defendant has a concrete interest in challenging the practice. This is not because the individual jurors dismissed by the prosecution may have been predisposed to

> favor [or dislike] the defendant; if that were true, the jurors might have been excused for cause. Rather, it is because racial discrimination in the selection of jurors "casts doubt on the integrity of the judicial process," and places the fairness of a criminal proceeding in doubt.
>
> . . . The intrusion of racial discrimination into the jury selection process damages both the fact and the perception of this guarantee. . . . Active discrimination by a prosecutor during this process [voir dire] condones violations of the United States Constitution within the very institution entrusted with its enforcement, and so invites cynicism respecting the jury's neutrality and its obligation to adhere to the law. . . .
>
> . . . A prosecutor's wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case. " The influence of the voir dire process may persist through the whole course of the trial proceedings. If the defendant has no right to object to the prosecutor's improper exclusion of jurors, and if the trial court has no duty to make a prompt inquiry when the defendant shows, by adequate grounds, a likelihood of impropriety in the exercise of a challenge, there arise legitimate doubts that the jury has been chosen by proper means. The composition of the trier of fact itself is called in question, and the irregularity may pervade all the

proceedings that follow.

> The purpose of the jury system is to impress upon the criminal defendant and the community as a whole that a verdict of conviction or acquittal is given in accordance with the law by persons who are fair. The verdict will not be accepted or understood in these terms if the jury is chosen by unlawful means at the outset. Upon these considerations, we find that a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race.

Powers, 499 U.S. at 411-13, 111 S.Ct. at 1371-72 (citations omitted).

Under *Rose*, defendant does not have standing to bring an equal protection claim challenging the exclusion of blacks from serving as grand jury foremen as he is not of the same race or "identifiable group" as those he alleges were excluded from serving as foremen. Under *Hobby*, defendant does not have standing to bring a due process claim challenging discrimination against blacks in the selection of grand jury foremen, as in that case, the Supreme Court held that the "ministerial role of the office of federal grand jury foreman is not such a vital one that discrimination in the appointment of an individual to that post significantly invades the distinctive interests of the defendant protected by the Due Process Clause." *Hobby*, 468 U.S. at 346, 104 S.Ct. at 3097. The role of the grand jury foreman in Louisiana appears to be similarly ministerial. Furthermore, under La. C.Cr.P. art. 436, any grand juror who objects to a rule of procedure made by the foreman may seek review from the court. Therefore, as in *Hobby*, discrimination in the selection of a grand jury foreman from a properly constituted venire has little, if any, effect on the defendant's due process right of fundamental fairness.

The United States Supreme Court has not yet addressed

whether a white defendant would have standing to raise the equal protection claims of members of another race who were not selected to serve as grand jury foremen because of their race. Although *Powers* gives to white defendants standing to bring an equal protection claim on behalf of jurors who were excluded from serving on the petit jury because of their race through the improper use of peremptory challenges, that holding was based on the considerable and substantial impact that such obvious discrimination by the prosecutor during voir dire would have on the defendant's trial as well as on the integrity of the judicial system as a whole. The same cannot be said for discrimination in the selection of a grand jury foreman, and we decline to extend *Powers* to such a situation.

The court of appeal erred in holding defendant had standing to bring either the due process or equal protection claims. The case is remanded to the court of appeal for treatment of defendant's remaining assignments of error.

REVERSED AND REMANDED.

REVERSED AND REMANDED.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. **NO. 96-K - 1785**

TERRY CAMPBELL

- - - - - - - -

IN RE: Campbell, Terry; - Defendant(s); Applying for Writ of certiorari and/or Review; Parish of Evangeline 13th Judicial District Div."A" Number 45,690; to the Court of Appeal, Third Circuit, Number CR94-1140

- - - - - - - -

January 10, 1997

Denied.

CDT
PFC
WFM
HTL
CDK
BJJ
JPV

KNOLL, J. recused; not on panel.
Supreme Court of Louisiana
January 10, 1997

S/Theophile A. Duroncelet
Clerk of Court
For the Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

May 13, 1996

Mr. Richard V. Burnes
Burnes & Burnes
P.O. Box 650
Alexandria, LA 71301-8030

Re: Terry Campbell
v. Louisiana
No. 95-1240

Dear Mr. Burnes:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,
S/William K. Suter
William K. Suter, Clerk

OFFICE OF CLERK

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. Box 3000
Lake Charles, La. 70602

Deposited in U.S. Mail
MAR 1 1995

NOTICE OF JUDGMENT

TO ALL COUNSEL OF RECORD:

ATTACHED YOU WILL FIND A COPY OF THE JUDGMENT OF THIS COURT IN A CASE IN WHICH YOU ARE ATTORNEY OF RECORD.

Your attention is invited to Rule 2.18.2 of the Uniform Rules - Courts of Appeal, which regulates applications for rehearing.

Please note also that it is no longer necessary to apply to the Court of Appeal for a rehearing as a prerequisite to applying to the Supreme Court for writs.

Cordially yours,

Kenneth J. deblanc
Clerk of Court

cc: Suit Record

(NOTE: Office hours are 8:30 A.M. to 4:30 P.M. for filings).

Port No. 3543

NO. CR94-1140

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 1 1995

STATE OF LOUISIANA

VERSUS

TERRY CAMPBELL

Appeal from the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana, Honorable Preston N. Aucoin, District Judge, presiding.

Before PETERS, AMY and SULLIVAN, Judges.

SULLIVAN, Judge.

Defendant, Terry Campbell, was tried by a jury and found guilty on May 12, 1994, of second degree murder, a violation of La. R.S. 14:30.1. He was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. His appeal urges eleven assignments of error. We remand with instructions.

In Assignment of Error Number 1, defendant contends the trial court erred in overruling his Motion to Quash Grand Jury Indictment. The motion alleged that the grand jury selection process in Evangeline Parish is discriminatory and in violation of the Sixth and Fourteenth Amendments to the United States Constitution as well as Article I, Section 2; Article I, Section 15; and Article I, Section 16 of the Louisiana Constitution. A hearing on defendant's

motion was held on December 2, 1993. In denying the motion, the trial judge stated:

> The court holds that in the case sub judice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.
>
> This court rules that the defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied.

The United States Supreme Court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991) held that under the Equal Protection Clause, "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race". *Powers*, at 111 S.Ct 1366. It concluded that a white defendant had standing to raise "third-party equal protection claims" of wrongful discrimination.

The state and the defense stipulated to certain facts at the beginning of the hearing in order to avoid having to call the Registrar of Voters as a witness.

However, this was insufficient to make a determination of discrimination in the grand jury selection process. As noted in *State v. Young*, 569 So.2d 570 (La.App. 1 Cir. 1990), *writ denied*, 575

So.2d 386 (La. 1991):

> However, since the general venire in East Baton Rouge Parish is composed of "qualified" persons drawn from a random list of registered voters and licensed drivers in that parish, the total percentage of a particular minority in the general population does not have a direct bearing on the make-up of the general venire, from which the grand jury venire is randomly drawn, and the grand jury foreman is selected. Rather, it is the percentage of the particular minority in the general population who are either licensed drivers or registered voters, **and** who meet the five qualifications necessary to become a juror, which is the appropriate percentage to compare with the actual percentage of minority grand jury foremen.
>
> Therefore, in order to make a prima facie showing of discrimination in the selection of a grand jury foreman, the defendant must show a disproportion over a significant period of time between the percentage of an identifiable minority in the general venire or grand jury venire, and the percentage of minority forepersons during that time; and that the selection process is susceptible of abuse. That is, the defendant must show that the percentage of minority persons in the general population who are qualified to serve as grand jurors is disproportionate to the actual number of minority grand jury forepersons over a significant period of time to establish a prima facie case. (Footnotes omitted.) (Citations omitted.)

Id at 575.

The information initially submitted by the defendant included only data from the voter registration list and several record

extracts showing the composition of local juries, and did not include the comprehensive data on the jury venire as required in *Young, supra.*

The same reasons enunciated in *Powers* should be employed in defendant's case. Although the role of the foreman of the grand jury in Louisiana may be ministerial in nature, a full evidentiary hearing should have been had on the matter and a ruling handed down on defendant's due process and equal protection claims. *State ex rel. Williams v. Whitley,* 629 So.2d 343 (La. 1993).

This court is sympathetic with the trial judge's concerns in this type of challenge. However, we, like he, must comply with established constitutional mandates. It is noteworthy that the U. S. Supreme Court, in *Rose v. Mitchell,* 443 U.S. 545, 99 S.Ct. 2993 (1979), in dealing with a similar situation, i.e., there never having been a black foreman of a grand jury in Tipton County, Tennessee, nonetheless held that defendant failed to present a prima facie case of discrimination.

Exercising our supervisory jurisdiction under Article V, Section 10, Louisiana Constitution, we remand for such a hearing and determination. If the trial court determines that the grand jury selection process in Evangeline Parish violated defendant's constitutional rights, it must quash the indictment. However, if the trial court finds that the selection process is constitutional, the Clerk of Court of Evangeline Parish is ordered to return this case to us, the record supplemented with the hearing and judge's ruling, so that we can complete the appeal process.

REMANDED, WITH INSTRUCTIONS.

OFFICE OF CLERK
COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA
P.O. Box 3000
Lake Charles, La. 70602

Deposited in
U.S. Mail
MAR 13 1996

NOTICE OF JUDGMENT

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Kenneth J. deBlanc
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Port No. 3543

NUMBER CR94-1140

COURT OF APPEAL, THIRD CIRCUIT

STATE OF LOUISIANA

MAR 13 1996

STATE OF LOUISIANA

VERSUS

TERRY D. CAMPBELL

Appeal from the Thirteenth Judicial District Court, Parish of Evangeline, State of Louisiana, Honorable Preston N. Aucoin, District Judge, presiding.

Before PETERS, AMY and SULLIVAN, Judges.

SULLIVAN, Judge.

This second degree murder case is before this court on remand from the Supreme Court of Louisiana. The defendant, Terry Campbell, was convicted of second degree murder and sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence. He appealed to this court and assigned eleven trial court errors. In our prior opinion, *State v. Campbell, 94-1140* (La.App. 3 Cir. 3/1/95); 651 So.2d 412, we determined that the trial court erred in denying Campbell's motion to quash the indictment on the basis that he, a white man, lacked standing to claim discriminatory treatment of blacks in the selection of grand jury foremen in Evangeline Parish. This court concluded that Campbell had standing to pursue third-party equal protection claims in the context of grand jury foremen selection. We remanded the case to the trial court for a full evidentiary

hearing on the matter.

The state applied for a writ of certiorari to the Supreme Court of Louisiana. On October 2, 1995, the supreme court granted the writ and reversed this court's decision. It determined that Campbell lacked standing to present a discrimination claim on behalf of the excluded black potential grand jury foreman. The supreme court remanded the case to this court for consideration of the defendant's ten remaining assignments of error. *State v. Campbell,* 95-824 (La. 10/2/95); 661 So.2d 1321.

FACTS

Preliminarily, we note that the defendant, Terry Campbell, suffered a head injury on August 6, 1986. As a result, the defendant had a portion of his brain surgically removed. Consequently, the defendant now suffers from organic brain syndrome, chronic pain syndrome and epileptic seizures.

The defendant was separated from his wife, Susan Campbell, on the date of the incident. On January 11, 1992, Susan Campbell was dropped off at her house by James Sharp after a night out with friends. After Mrs. Campbell entered her house, the defendant shot Mr. Sharp through the window of Mr. Sharp's van. Mr. Sharp allegedly tried to run over the defendant in the van. Mr. Sharp tried to drive away from the scene but wrecked his vehicle in a neighbor's yard, where he died at the scene. The defendant was subsequently arrested and charged with second degree murder, in violation of La.R.S. 14:30.1.

Campbell was indicted by a grand jury. On March 6, 1992, defendant appeared in court with counsel for arraignment and entered a plea of not guilty. Defendant thereafter filed a Motion to Change Plea from Not Guilty to Not Guilty by Reason of Insanity. On July 16, 1992, the court granted defendant's motion, rearraigned the defendant, and granted the state's motion to appoint a sanity commission. On January 8, 1993, defendant appeared in court for a sanity hearing. The defense and state agreed to stipulate to

medical reports in lieu of the doctors' testimony. Based on the reports, the court ordered the defendant to be admitted to East Feliciana Hospital for further evaluation.

A second sanity hearing was held on June 11, 1993. Evidence was introduced and arguments were presented. The court determined that the defendant had the capacity to proceed and assist counsel in his defense. The state moved to have two doctors from the East Feliciana Hospital examine the defendant to determine his mental capacity at the time of the offense. The court ordered the state to prepare an order. On November 23, 1993, the defendant orally moved to limit the number of expert witnesses, which motion was denied by the court. On December 2, 1993, the defendant filed a Motion to Quash the Grand Jury Indictment, which motion was denied by the court. Arguments were also heard on defendant's Motion to Suppress Inculpatory Statements, which motion was also denied by the court.

Trial by jury began on December 6, 1993. The defense stipulated that the defendant shot the victim, Mr Sharp. On January 12, 1994, the state and the defendant jointly moved for a mistrial. The trial court granted the motion. A second trial by jury began on May 9, 1994. Defendant re-urged his Motion to Suppress, which motion was denied by the trial court. On May 12, 1994, the jury returned a unanimous verdict of guilty as charged. On May 20, 1994, the defendant was sentenced to life imprisonment at hard labor, without benefit of probation, parole or suspension of sentence.

As mentioned, Campbell's first assignment of error was found to lack merit by the supreme court. Defendant's remaining assignments of error are as follows:

1. The trial court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense

remained with him throughout the proceedings and exist to this date.

2. The trial court erred in overruling defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial, and in overruling defendant's oral Motion to Limit Expert Witnesses.

3. The trial court erred in overruling defendant's written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress.

4. The trial court erred in ruling during the course of the trial on defendant's oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause).

5. The trial court erred when it refused to give defense requested jury charges number 2, 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

6. The trial court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

7. The trial court erred when it overruled defendant's written objections to the proffered general jury

charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the court's general charge did not specify the enumerated or non-enumerated felonies nor did the court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

8. The trial court erred in failing to sustain defendant's objections to the proffered general jury charges.

9. The trial court erred in overruling defendant's motion for new trial.

10. The trial court erred in overruling defendant's motion for post verdict judgment of acquittal.

Our review of the record reveals that all of Campbell's remaining assignments of error lack merit. Accordingly, for the following reasons, the defendant's conviction and sentence are affirmed.

ASSIGNMENT OF ERROR NO. 1

By this assignment of error, defendant contends the trial court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense remained with him throughout the proceedings and exist to this date.

Defendant's argument depends on the testimony of Dr. Charles Fontenot, a member of the sanity commission who found the defendant incompetent to assist counsel at trial, and the testimony of Dr. Phillip Landry, who was also on the sanity commission. Dr. Landry concluded "that his attorney might be at a disadvantage in putting up a defense for him based on what ... seemed to be some pretty profound memory problems."

Dr. Fontenot, Coroner of Evangeline Parish, examined the defendant on July 22, 1992. The defendant told Dr. Fontenot that he did not remember the actual shooting but he did remember the events around the shooting, such as the incident happening in his wife's driveway and the victim being in a vehicle. Dr. Fontenot was of the opinion that the defendant understood right from wrong at the time of the incident. Dr. Fontenot testified that because the defendant could not remember the actual shooting, the defendant might have a hard time assisting his attorney. Dr. Fontenot recommended that the defendant not stand trial at that time but that he be hospitalized at a state hospital until such time that they felt his memory had improved to the point where he could stand trial. However, Dr. Fontenot was of the opinion that the defendant knew right from wrong at the time he examined him.

Dr. Landry, a psychiatrist in Opelousas, testified that his examination revealed that the defendant did not remember details of the incident but did "have a vague recollection that someone had attempted to run over him and that some individual had apparently brought his wife home on the night that this incident occurred." Dr. Landry noted that the defendant had driven himself to the office, was appropriately dressed, and did not seem distressed. The defendant had no trouble remembering the three different medications he was taking as well as the different doses. However, Dr. Landry did note that the defendant had a significant impairment of memory. Dr. Landry felt that the defendant understood the nature of the charges against him and could appreciate the seriousness of the charges. As pointed out by the defendant, Dr. Landry felt that an attorney "might be at a disadvantage in putting up a defense for him based on what, at least in the office, seemed

to be some pretty profound memory problems." However, Dr. Landry did state that he felt "that he could go ahead with trial." Dr. Landry was also of the opinion that the defendant had the ability of distinguishing a plea of guilty from a plea of not guilty and was able to maintain a consistent defense and make simple decisions in response to well explained alternatives.

Dr. Richard Gibson, an expert in the field of medicine and psychiatry, examined the defendant at East Feliciana Hospital and also determined that the defendant was capable of standing trial.

The twofold test of mental capacity to stand trial under La.Code Crim.P. art. 641 is set out in *State v. Williams,* 381 So.2d 439 (La.1980). The court must determine (1) whether the accused fully understands the consequences of the proceedings and (2) whether he has the ability to assist in his defense by consultation with counsel. The defendant bears the burden of proving by a clear preponderance reasonable grounds for the judge to believe that he is mentally defective or was at the time of the offense. *State v. Vincent,* 338 So.2d 1376 (La.1976). The final determination of a defendant's competency to stand trial rests with the trial judge and not the medical examiners. It is a legal and not a medical issue. *State v. Qualls,* 377 So.2d 293 (La. 1979). The trial judge's determination of competency to stand trial is entitled to great weight and will not be disturbed on appeal absent a showing of manifest error. *State v. Brown,* 414 So.2d 689 (La. 1982).

The trial court did not commit manifest error in determining that the defendant had the capacity to stand trial. Both members of the sanity commission were substantially in accord. Although Dr. Fontenot recommended that the defendant be hospitalized until his memory improved, he agreed with Dr. Landry that the defendant knew right from wrong at the time of the examination. Although the defendant alleges that he does not remember the facts of the shooting, and this fact if true may somewhat hinder his assistance to counsel, this fact alone should not have prevented the defendant from going to trial.

For the foregoing reasons, we find the trial judge did not err as the defendant failed to meet his burden of proving that he did not have the capacity to proceed to trial. Accordingly, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 2

This assignment of error was abandoned by the defendant.

ASSIGNMENTS OF ERROR NOS. 3 and 4

These assignments of error have been combined by the defendant in his brief. Therefore, we will address them together.

By these assignments of error, the defendant contends that the trial court erred in overruling his Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress as well as his oral Motion to Suppress Inculpatory Statements and expanded oral Motion to Suppress Inculpatory Statements. Defendant cited several reasons for these assignments, including that the arrest warrant was issued without probable cause. However, he failed to argue the lack of probable cause issue in brief. Pursuant to rule 2-12.4 of the Uniform Rules - Courts of Appeal, we consider this portion of the assigned error to be abandoned by Campbell. We shall therefore only address the remaining issues raised by the defendant.

Ville Platte Police Chief L.C. Deshotel testified at trial that an arrest warrant was issued for the defendant charging him with second degree murder. The warrant appointed Gary Ortego to represent the defendant, "representation to begin immediately." Defendant was subsequently arrested at Cypress Hospital in Lafayette. The defendant was advised of his rights and booked into the Lafayette Parish Correctional Center. When the defendant was transferred from Lafayette Parish to the custody of Police Chief Deshotel and Evangeline Parish Sheriff s Deputy Jack Aucoin, he was again advised of his rights. Chief Deshotel stated that they did

not attempt to question the defendant as they were instructed by Judge Aucoin not to do so. On the way to the Evangeline Parish jail, the defendant made several spontaneous inculpatory statements.

The defendant was advised of his *Miranda* rights by Deputy Aucoin, who read from a preprinted card. At the end of the *Miranda* card, there are two questions. One asks if the defendant understood his rights and one asks if the defendant, after being informed of these rights, would like to make a statement. Chief Deshotel testified that the defendant stated that he understood his rights but he did not hear the defendant say that he wished to talk.

Deputy Aucoin testified that he read the defendant his *Miranda* rights. The defendant acknowledged that he understood his rights. When Deputy Aucoin asked the defendant if he wished to talk to them the defendant said "no." Deputy Aucoin testified that the defendant made certain inculpatory statements to him and Chief Deshotel and at no time did they question the defendant as they were instructed not to do so.

Defendant argues that his Fifth Amendment rights were violated because he did not knowingly and intelligently waive his right to remain silent. Defendant contends that both "Chief Deshotel and Deputy Aucoin were aware or should have been aware that he could not make a knowing, intelligent and voluntary waiver of his right to remain silent due to his mental disease or defect." Defendant points out that no written waiver of his right to remain silent was introduced into evidence.

Defendant's "mental disease or defect" does not prevent him from making a knowing and intelligent waiver of his rights. The issue is whether the defendant had the mental capacity and was able to understand the rights explained to him. *See Brown,* 414 So.2d 689. Both Chief Deshotel and Deputy Aucoin testified that the defendant acknowledged that he understood his rights as they were explained to him. While being read his rights, the defendant interrupted and told the law enforcement officers that he knew his rights. Deputy Aucoin finished reading the defendant his rights and

then asked the defendant if he understood his rights. The defendant acknowledged that he did. Deputy Aucoin further testified that neither he nor Chief Deshotel told the defendant anything or did anything to induce him to make these statements. Besides making several inculpatory statements, the defendant carried on a conversation with Chief Deshotel about hunting, thus leading one to believe that the defendant had his faculties and was able to understand the rights explained to him.

Dr. Jimmie Cole, a clinical psychologist who examined the defendant at Cypress Hospital, agreed with defense counsel's assertion that the defendant's 46 mental condition [was] such that it would have significantly affected the voluntariness and knowing and intelligent making of a statement on the date he was taken from the hospital." Cypress Hospital, however, allowed the defendant to sign a "formal voluntary admission" when he entered the hospital. Dr. Cole testified that a person would not be admitted unless they had the mental capacity to make such a "voluntary admission themselves."

We conclude that Campbell had sufficient mental capacity to understand the rights explained to him. He twice told the law enforcement officers that he understood his rights. No countervailing credible evidence indicates that Campbell was incapable of understanding his rights.

We next turn to the issue of whether he knowingly and intelligently waived those rights. After being read his rights, Campbell told Deputy Aucoin that he did not wish to speak, thereby invoking his right to silence. He thereafter voluntarily made inculpatory statements. We must decide if, by doing so, Campbell knowingly and intelligently waived his right to remain silent. In that regard, the supreme court in *State v. Loyd,* 425 So.2d 710, 716 (La. 1982) explained as follows:

> [The United States Supreme Court] concluded that the admissibility of statements obtained after the person in custody has decided to remain silent

depends on whether his "right to cut off questioning" was *"scrupulously honored."* Through the exercise of his option to terminate questioning, he can control the time of when questioning occurs, the subjects discussed, and the duration of questioning. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. *Michigan v. Mosley* [sic], 96 S.Ct. at 326, 46 L.Ed.2d at 321 [(1975)].

. . . .

. . . *Miranda* recognizes that the Fifth Amendment only protects against some kind of compulsion - and not the kind produced by custody alone. *In the absence of police interrogation, the coercion of arrest and detention does not rise to the level of "compulsion" within the meaning of the privilege.* Kamisar, Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?, 67 Georgetown L.J. 1, 50-53, 63-69 (1978).

[Emphasis added.]

In the case *subjudice,* Campbell's inculpatory statements were made of his own volition and not in response to interrogation by Chief Deshotel or Deputy Aucoin. Clearly, under the precepts of *Michigan v. Mosely,* these officers scrupulously honored Campbell's right to cut off questioning. He cannot now assert that his right to remain silent was violated, because no further interrogation occurred. Campbell apparently changed his mind and voluntarily decided to make the statements at issue. Nothing in *Miranda* prevents a defendant from changing his mind about giving a statement. *State v. Daniel,* 378 So.2d 1361 (La.1979); *State v. Taylor,* 490 So.2d 459 (La.App. 4 Cir.), *writ denied,* 496 So.2d 344 (La.1986).

For these reasons, defendant's claim of a Fifth Amendment violation lacks merit.

The defendant also contends that his Sixth Amendment right to counsel was violated as both Chief Deshotel and Deputy Aucoin were aware that the judge who signed the arrest warrant appointed an attorney at that time. Defendant directs this court's attention to *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232 (1977), in which the United States Supreme Court held that a defendant who, after asserting his right to counsel, made incriminating statements after further interrogation did not waive his right to counsel, and that those inculpatory statements were obtained in violation of the Sixth and Fourteenth Amendments. In *Brewer,* the Supreme Court found that prior to the interrogation, steps in the prosecution had already commenced and, therefore, the defendant's Sixth Amendment rights had already attached. This finding distinguishes Brewer from the case at hand. This case is more properly compared to *Moran v. Burbine,* 475 U.S. 412, 106 S.Ct. 1135 (1986), in which the United States Supreme Court held that even when an attorney had been contacted by a defendant's family member without the defendant's knowledge, and the attorney was hindered in his attempt to meet with the defendant by law enforcement, the defendant's confession was still admissible assuming a valid waiver. In reaching this conclusion, the Supreme Court specifically found that the prosecution had not yet commenced and therefore, the defendant's Sixth Amendment rights had not yet attached.

Although an attorney was appointed for the defendant as part of the arrest warrant and the defendant was informed of his right to have an attorney appointed, neither Chief Deshotel nor Deputy Aucoin informed the defendant that an attorney had been appointed. Defendant contends that, once a defendant has an attorney, "the sole contact between the state and the defendant should be through the defendant's counsel." We do not find that the protection of the defendant's Sixth Amendment rights requires such a procedure. *See State v. Carter,* 94-2859 (La. 11/27/95); 664 So.2d 367.

Therefore, we do not find that the defendant's Sixth Amendment right to counsel has been violated in that it had not yet attached when the spontaneous inculpatory statements were made. Even assuming for argument that his right had attached, we still find that, based on the decision in *Carter*, his right has not been violated.

Accordingly, these assignments of error are meritless.

ASSIGNMENT OF ERROR NO. 5

By this assignment of error, the defendant contends the trial court erred in refusing to give requested jury charges numbers two, three, four and five all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict to consider. The trial court declined to give the requested charges and, instead, gave the general jury charges. Defendant objected.

La.Code Crim.P. art. 802(l) requires the court to instruct the jury as to the law applicable to the case. When properly requested to do so, the court is obligated to charge the jury as to the law applicable to any theory of defense which the jurors could reasonably infer from the evidence. *State v. Jackson*, 450 So.2d 621 (La.1984).

Defendant directs this court's attention to *State v. Williams*, 606 So.2d 1387, 1389 (La.App. 2 Cir. 1992), wherein the second circuit held:

> Under LSA-C.Cr.P. Art. 814, negligent homicide is not a responsive verdict to second degree murder. However, in cases involving various grades of murder, such as first degree murder, second degree murder, or manslaughter, when there is evidence from which the jury can infer that the defendant is guilty of negligent homicide, the trial court should charge the jury with the defendant's requested special charges on the law of negligent

> homicide. *State v. Vergo*, 594 So.2d 1360 (La.App. 2d Cir. 1992); *State v. Gray*, 430 So.2d 1251 (La.App. 1st Cir. 1983).

In Williams, evidence was presented that the victim and the defendant "tussled" just prior to the gunshot. Thus, the second circuit concluded that the jury could have found the gun discharged accidentally. Accordingly, it was reversible error for the trial court not to instruct the jury on the law of negligent homicide.

If a negligent homicide instruction is indicated by the evidence in the case, the omission of the instruction may be harmless error. Id. The court's failure to instruct on negligent homicide is prejudicial to the defendant only if the jury has insufficient information to understand that if he was guilty of only negligent homicide, it should find him not guilty of the charged offense. Id.

The only evidence presented supporting the negligent homicide jury charge is Campbell's own self-serving testimony that Mr. Sharp allegedly tried to run him over with a van. We conclude that this testimony alone is not sufficient to provide the jurors with a reasonable basis from which to infer from the evidence that negligent homicide applies. Therefore, the trial court did not err in declining to give the requested jury charge on negligent homicide. Because we find no error, we necessarily do not reach the harmless error analysis.

ASSIGNMENT OF ERROR NO. 6

By this assignment of error, defendant contends the trial court erred when it refused to give defense's requested jury charge number seven, which he alleges was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent.

In charging the jury on the law applicable to the present case, the trial judge stated:

The following are the essential facts required to be proved beyond any reasonable doubt in order to justify a verdict of guilty of Second Degree Murder.

1. That the defendant, Terry D. Campbell, killed James L. Sharp in Evangeline Parish, Louisiana;

2. That the defendant, Terry D. Campbell, acted with the specific intent to kill or to inflict great bodily harm.

Intent implies premeditation. Criminal intent exists when the act from which the crime results was done willfully. It is a mental attitude which is made known by acts. It is not susceptible of proof, but it must be implied from the proven acts of a reasonable person.

When the word intent is qualified by prefixing to it the word specific, it means that the intent was directed towards the accomplishment of a particular or definite act. Again, intent implies premeditation, and specific intent implies premeditation with reference to the commission or [sic] a particular or definite act.

In criminal law premeditation means a design or a preconceived plan to commit a crime. It denotes the will and deliberate and continued persistence to commit a crime.

With reference to the crime of murder it is immaterial whether the specific intent or premeditation existed for a brief or great length of time before the killing. It is sufficient that it existed only a moment prior to the commission of

the act which resulted in the killing. As to murder, the law indicates no definite time within which a specific intent to kill must be formed so as to make the killing murder. The specific intent may have existed a moment antecedent to the act itself which caused the death, or a day or another period of time.

Specific intent or premeditation may be implied from certain acts; for example, when it is established that an accused laid in wait for his or her alleged victim; when an accused made previous threats against the deceased; when there existed between the defendant and the deceased former grudges; when an accused arms himself or herself beforehand, or from any other facts observable by the senses, which show a previously planned scheme to commit a crime.

Specific intent or premeditation, may also be implied when there are not external signs of it beyond the mere fact of the killing. For instance, when there was no lawful reason for it; and when the killing is without provocation, or upon so slight provocation as to not justify it.

The defendant argues the court's jury instructions do not indicate that "criminal intent must exist at the same time as the acts of the defendant."

We disagree with the defendant's assessment. The trial judge adequately stated that "[c]riminal intent exists when the act from which the crime results was done willfully .... When the word intent is qualified by prefixing to it the word specific, it means that the intent was directed towards the accomplishment of a particular or definite act .... It is sufficient that it existed only a moment prior to the commission of the act which resulted in the killing." Taken as a whole, the trial court's instructions were sufficient. "When the

instruction given is not erroneous, in view of the context of the overall charge, no error occurs." *State v. Douget,* 507 So.2d 283, 289 (La.App. 3 Cir.), *writ denied,* 513 So.2d 288 (La.1987). Defendant's requested intent instruction was incorporated in the trial court's jury charge when it related to the jury that it must find the defendant "acted with the specific intent to kill or to inflict great bodily harm" in order to justify a verdict of guilty of second degree murder.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 7

By this assignment of error, the defendant contends the trial court erred when it overruled his objections to the proffered general jury charges. Specifically, he argues that the court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in La.R.S. 14:30 and La.R.S. 14:30.1 but did not specify or define the enumerated or non-enumerated felonies.

Defendant argues that because an incomplete definition of manslaughter was given, the jury could not have adequately considered that verdict. Thus, defendant claims the jury was left only with the choice of finding him guilty of the greater charge of second degree murder.

In State v. Henry, 449 So.2d 486, 488-89 (La.1984), the Supreme Court of Louisiana stated:

> [A]lthough the court must charge the jury of the law applicable to lesser included offenses. . . the charges must be pertinent; there must be evidence which would support a conviction of the lesser offenses. A trial judge is required "to charge the jury as to the law applicable to the case, under which he is required to cover every phase of the case *supported by the evidence,* whether or not

> accepted by him as true."

[Citations omitted; footnote omitted.]

In the present case, the defendant alleges he did not have the specific intent to commit the crime as he was legally insane at the time of the offense. In *State v. Hill,* 93-405 (La.App. 5 Cir. 3/29/94), 636 So.2d 999; *writ denied,* 94-3144 (La. 9/l/95), 658 So.2d 1259, the court held that the trial court did not err in failing to instruct the jury on the second section of the manslaughter statute, La.R.S. 14:31(2). The court reasoned that the trial judge was of the opinion that the specific intent was what Hill's defense was based on; therefore, the second paragraph of La.R.S. 14:31 was not relevant. Accordingly, the court held that the defendant was not deprived of any substantial right.

Unlike Hill, the defendant in the present case objected to the jury charge as given. However, as in Hill, Campbell's defense was based on a lack of intent, albeit due to his alleged insanity. Therefore, the second paragraph of La.R.S. 14:31 was likewise not relevant. We find that Campbell was therefore not deprived of any substantial right.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR NO. 8

By this assignment of error, defendant asserts the trial court erred in failing to sustain his objections to the proffered general jury charges. Defendant contends for the reasons argued in assignments of error numbers five, six and seven the objections should have been sustained. This assignment is repetitive and the merits thereof have been addressed.

ASSIGNMENTS OF ERROR NOS. 9 and 10

These final assignments of error are interrelated. As such, we shall address them together.

By these assignments of error, the defendant contends the trial court erred in denying defendant's Motion for New Trial and Motion for Post Verdict Judgment of Acquittal. In his motion for new trial, defendant asserted eleven reasons for the granting of a new trial. Defendant urged two reasons for the granting of a post verdict judgment of acquittal. Defendant states in brief that many of the issues in both motions were argued in assignments of error numbers one through nine or were abandoned. Accordingly, defendant only argues in brief grounds one, two and eleven of the motion for new trial, and both grounds for his post verdict judgment of acquittal. He alleges that a new trial should have been granted because the verdict is contrary to the law and evidence, he was incapable of distinguishing between right and wrong at the time of the offense and the ends of justice would be served by granting him a new trial.

Motion for New Trial

La.Code Crim.P. art. 951 provides, in pertinent part:

> The motion for a new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case the motion shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> (1) The verdict is contrary to the law and the evidence;
>
> (2) The court's ruling on a written motion, or an objection made during the proceedings, shows prejudicial error;
>
> (5) The court is of the opinion that the ends of justice would be served by the granting of a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right.

When ruling on a Motion for New Trial, the trial court must apply the "thirteenth juror" standard and review the weight of the evidence. On review, the appellate court determines if the trial judge abused his discretion. If the motion is granted, the state has one year within which to retry the case unless a longer period is available under the statutory period for the particular offense. La.Code Crim.P. arts. 582 and 578.

In State v. Washington, 614 So.2d 242, 244 (La.App. 3 Cir.), *writ denied,* 619 So.2d 5 75 (La. 1993), this court stated:

> *In State v. Landry,* 524 So.2d 1261 (La.App. 3 Cir. 1988), writ granted in part, writ denied in part, 531 So.2d 254 (La.1988), appeal after remand, 546 So.2d 1231 (La.1989) [sic], this court held that a trial judge, in reviewing the merits of a motion for a new trial must review the weight of the evidence, and make a factual determination as a thirteenth juror. This court further stated that, except for an error of law, an appellate court may not review the granting or denial of a new trial under La. C.Cr.P. art. 858 citing *State v. Robinson,* 490 So.2d 501 (La.App. 4 Cir. 1986), writ denied, 495 So.2d 303 (La. 1986). In so holding, this court reasoned that the trial judge's statement indicating that he agreed with the jury's interpretation of the evidence showed compliance with the "thirteenth juror" standard of reweighing the evidence, as outlined in *Tibbs v. Florida,* 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). As a result this court found there was no error of law.

In the instant case, however, the trial judge

did not specifically mention what standard he used in determining the merits of the defendant's motion for new trial. Thus, as the trial judge did not indicate otherwise, we will assume for the purposes of this review that the trial judge properly applied the "thirteenth juror" standard in making his determination on the merits of the motion for new trial.

This court implied in *Landry* that, except for an error of law, an appellate court may not review the granting or denial of a new trial citing La. C.Cr.P. art. 858 and *Robinson*. However, *Robinson* clearly states a denial of a motion for a new trial, urged on the ground that the verdict is contrary to the law and evidence, is reviewable only for abuse of discretion. *Robinson* at 505.

Additionally, the denial of a motion for new trial based on La.Code Crim.P. art. 851(5), in the interest of justice, is not subject to review on appeal. *State v. Prudhomme,* 532 So.2d 234 (La.App. 3 Cir. 1988), *writ denied,* 541 So.2d 871 (La. 1989). Therefore, we shall not address ground number eleven of Campbell's motion for new trial, which was based upon serving the ends of justice.

As in *Washington,* 614 So.2d 242, the trial judge did not specifically mention on the record that he applied the "thirteenth juror" standard in evaluating Campbell's motion. On ground number one, based on La.Code Crim.P. art. 851(1), the trial judge stated that "the court is ruling that the verdict is not contrary to the law and evidence within the intendment of the law and jurisprudence." On ground number two, which was based on the issue of insanity at the time of the offense, the trial judge stated that "the jury apparently found that the evidence did not preponderate in favor of the defense of insanity at the time of the offense and the court is not going to change that." The trial judge's failure to specifically state that, in evaluating defendant's motion, he became the "thirteenth juror," does not necessitate a finding that

he applied the wrong standard. In the absence of any evidence to the contrary, we assume for purposes of this review that the trial judge properly applied the "thirteenth juror" standard. We infer from the substance of the above-cited trial court rulings, indicating that the jury's decision was correct, that the trial judge applied the correct standard.

On ground number one, the defendant offered no real evidence to contest the credibility of witnesses to the circumstances surrounding the shooting or the law enforcement officials who heard the voluntary inculpatory statements made by the defendant after the shooting. We therefore conclude that the trial court did not abuse its discretion in denying the motion for new trial on ground number one, that the verdict was contrary to the law and evidence.

We shall next consider whether the trial court abused its discretion by denying the motion for new trial as to ground number two, defendant's sanity at the time of the offense. The defense presented the testimony of five physicians, all of whom concluded that Campbell was incapable of distinguishing right from wrong at the time of the commission of the offense. Of these doctors, only Dr. Cole can be considered as having been Campbell's treating physician, having first treated him in 1986. The state, on the other hand, presented the testimony of four expert physicians who uniformly agreed that Campbell could distinguish right from wrong at the time of the commission of the offense. Clearly, therefore, the credible evidence and testimony conflicted on this issue.

A review of the colloquy at the hearing on Campbell's motion for new trial reveals that defense counsel argued that, in view of the strong opinions expressed by defense experts, the jury erred in failing to find that Campbell proved his insanity by a preponderance of the evidence. The assistant district attorney argued that the jury correctly made a *factual* determination based on the experts' testimony and the circumstances surrounding the shooting.

The jury heard the opinions of nine experts, five for the

defense and four for the state. All, except Drs. Cole and Donald Harper, had never examined the defendant until after the incident. A defendant is presumed sane and "has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence." La.Code Crim.P. art. 652. When a defendant presents evidence in an attempt to establish his insanity at the time of the offense, the state is not required to offer any proof of his sanity nor is it required to offer evidence to rebut that presented by the defendant. Rather, the determination of whether defendant's evidence rebuts the sanity presumption is made by the trier of fact (in this case, the jury) viewing all of the evidence including expert and lay testimony, defendant's conduct, and his actions in committing the particular crime. *State v. Bell,* 543 So.2d 1013 (La.App. 3 Cir. 1989), and the cases cited therein. As stated, in considering a motion for new trial, the trial judge, as the thirteenth juror, must apply these same rules to his evaluation of the evidence.

Under the circumstances presented in this case, we conclude that the trial judge did not abuse his discretion in refusing to change the apparent jury finding that the evidence did not preponderate in favor of the insanity defense at the time of the shooting. The expert testimony was clearly in conflict. We cannot say that, in reevaluating the evidence, the trial judge erred in reaching the same conclusion as did the jury.

Motion for Post Verdict Judgment of Acquittal

La.Code Crim.P. art. 821 provides:

> A. The defendant may move for a post verdict judgment of acquittal following the verdict. A motion for a post verdict judgment of acquittal must be made and disposed of before sentence.
>
> B. A post verdict judgment of acquittal shall be granted only if the court finds that the evidence, viewed in a light most favorable to the

> state, does not reasonably permit a finding of guilty.
>
> C. If the court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.
>
> D. If a post verdict judgment of acquittal is granted or if a verdict is modified, the state may seek review by invoking the supervisory jurisdiction of or by appealing to the appropriate appellate court.
>
> E. If the appellate court finds that the evidence, viewed in a light most favorable to the state, supports only a conviction of a lesser included responsive offense, the court, in lieu of granting a post verdict judgment of acquittal, may modify the verdict and render a judgment of conviction on the lesser included responsive offense.

In reviewing a denial of a motion for post verdict judgment of acquittal, an appellate court in Louisiana is controlled by the standards enunciated in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781 (1979) for reviewing the sufficiency of the evidence to support a conviction. In *State v. Joseph,* 619 So.2d 1229, 1233 (La.App. 3 Cir.), *writ granted on sentencing issue,* 629 So.2d 360 (La. 1993), this court stated:

> This standard, which was adopted by the legislature in enacting La. C.Cr.P. art. 821, pertaining to post verdict motions for acquittal based on insufficiency of evidence, is that the court

> must determine that the evidence, viewed in the light most favorable to the prosecution, was insufficient to convince a rational trier of fact that all of the elements of the crime had been proved beyond a reasonable doubt.

It is the role of the fact finder to weigh the respective credibility of witnesses, and therefore the appellate court should not second-guess the credibility determinations of the trier of fact beyond the sufficiency evaluations under the *Jackson* standard of review. *State ex rel. Graffignino v. King*, 436 So.2d 559 (La.1983) citing *State v. Richardson*, 425 So.2d 1228 (La.1983).

In order for the state to obtain a conviction, it must prove the elements of the crime beyond a reasonable doubt. Second degree murder, as applicable to the case *subjudice*, is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm. La.R.S. 14:30.1(A)(1).

On May 12, 1994, a jury returned a unanimous verdict of guilty as charged. At defendant's first trial, it was stipulated that the defendant shot the victim, James Sharp. No such stipulation was made at the second trial. The evidence at the second trial consisted of several inculpatory statements the defendant made in the presence of Police Chief L.C. Deshotel and Deputy Jack Aucoin while they were transporting the defendant from the Lafayette Parish Correctional Center to Evangeline Parish.

Both Chief Deshotel and Deputy Aucoin testified that the defendant was read his *Miranda* rights yet continued to make several inculpatory statements without being prompted. Both testified the defendant said:

> What would you do if someone tried to pass over you with a van.
>
> I sure made a big mistake.

> I told Dr. Cole that I wished it was me and not that man.
>
> Where is my gun? Boy that.357 is a nice shooting gun.
>
> I just jumped out of the way. He tried to run over me so I shot him. All I wanted to do was to talk to the man, but he tried to run over me. I am sorry for what I did. I only wanted to scare him.

The victim, James Sharp, was out on the evening of January 11, 1992 with Susan Campbell, the estranged wife of the defendant. Mr. Sharp dropped Mrs. Campbell off at her home, whereupon Mrs. Campbell went inside. Although the defendant was still married to Mrs. Campbell, they were separated at the time and the defendant was residing with his sister. While exiting Mrs. Campbell's driveway, Mr. Sharp was shot through the window of his van. Glass from the window was found in Mrs. Campbell's driveway. Mr. Sharp drove a short distance into the yard of a neighbor and wrecked into a gas meter. Mr. Sharp died at the scene.

Although no gun was ever produced, a box of .357 bullets was found in the defendant's truck. The victim died as a result of a single gunshot wound from a large caliber bullet.

The evidence, when viewed in a light most favorable to the prosecution, was sufficient to find the defendant guilty of the crime charged.

For the purposes of the Motion for Post Verdict Judgment of Acquittal, the trial court correctly determined that the jury did not err in determining that Campbell was sane at the time of the commission of the offense. The jury was presented with nine expert witnesses, four of whom concluded that the defendant was capable of distinguishing right from wrong at the time of the offense. The jury weighed the respective credibilities of the witnesses and the

circumstances of the offense. It returned a unanimous verdict of guilty.

The question of whether defendant has affirmatively proved his insanity and should not be held responsible for his actions is one for the jury. *State v. Marmillion,* 339 So.2d 788 (La.1976). All of the evidence, including both expert and lay testimony, and the actions of the defendant, should be considered by the jury in determining sanity. *State v. Pravata,* 522 So.2d 606 (La.App. 1 Cir.), *writ denied,* 531 So.2d 261 (La. 1988); *Bell,* 543 So.2d 1013. It is for the jury to consider both the expert and lay testimony given and to determine whether it believed that the defendant had successfully rebutted the presumption that he was sane at the time of the offense. *See State v. Parker,* 416 So.2d 545 (La.1982).

The defendant claimed that he was insane at the time of the offense. In Louisiana, both by statute and jurisprudence, an adult defendant is presumed to be sane and responsible for his actions. La.R.S. 15:432; *State v. Guidry,* 450 So.2d 50 (La.App. 3 Cir. 1984), *writ denied,* 476 So.2d 344 (La.1985). "A defendant may rebut this presumption by showing, by a preponderance of the evidence, that he was suffering from a mental disease or defect which rendered him incapable of distinguishing right from wrong with reference to the conduct in question." *State v. David,* 425 So.2d 1241, 1244 (La.1983). *See* La.Code Crim.P. art. 652.

Although it is undisputed that the defendant suffered from a mental disease or defect, the jury, having unanimously found the defendant guilty, apparently concluded that his mental disease or defect did not render him incapable of distinguishing right from wrong at the time of the offense. A rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was legally insane at the time of the offense. Given the conflicting nature of the medical testimony and the factual circumstances surrounding the offense, we conclude that the trial court did not abuse its discretion in denying defendant's motion for post verdict judgment of acquittal.

ERRORS PATENT

La.Code Crim.P. art. 920 provides the scope of review on appeal, as follows:

> The following matters and no others shall be considered on appeal:
>
> (1) An error designated in the assignment of errors; and
>
> (2) An error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence.

In accordance with this article, we review appeals for errors patent on the face of the record.

La.Code Crim.P. art. 880 provides that, when imposing sentence, the court shall give the defendant credit toward service of his sentence for time spent in actual custody prior to the imposition of sentence. The record indicates the trial court did not do so. Resentencing is not required; however, we remand this case and order the district court to amend the commitment and minute entry of the sentence to reflect that the defendant is given credit for time served. *State v. Jones,* 607 So.2d 828 (La.App. 1 Cir. 1992), *writ denied,* 612 So.2d 79 (La.1993).

DECREE

For these reasons, the defendant's conviction and sentence are affirmed. The case is remanded for the trial court to amend the sentence as instructed in this opinion.

AFFIRMED AND REMANDED.

CRIMINAL DOCKET NUMBER 45,690

13TH JUDICIAL DISTRICT COURT,

PARISH OF EVANGELINE

Dec 1 956 AM '93

STATE OF LOUISIANA

STATE OF LOUISIANA

VERSUS

TERRY D. CAMPBELL

FILED: S/12-1-93 : S/Tina C. Fontenot DY. CLK.

MOTION TO QUASH GRAND JURY INDICTMENT

TO THE HONORABLE, THIRTEENTH JUDICIAL DISTRICT COURT, PARISH OF EVANGELINE, STATE OF LOUISIANA:

NOW INTO COURT, through undersigned counsel comes the defendant/mover TERRY D. CAMPBELL, and for purposes of this motion respectfully represents that:

1.

Defendant is charged by grand jury indictment with the offense of second degree murder. His trial is scheduled to commence in Ville Platte, Louisiana on Monday, December 6, 1993.

2.

Defendant/mover was indicted on February 4, 1992 and his

arraignment was on March 6, 1992.

3.

On June 1, 1992 defendant filed a Motion to Change Plea of Not Guilty to Not Guilty and Not Guilty by Reason of Insanity, This motion was granted on July 10, 1992 by the Honorable Preston N. Aucoin.

4.

Defendant now moves to quash the indictment against him and request that this prosecution be dismissed for the following reasons, to wit:

5.

Defendant shows that the indictment against him is defective in that the manner of selection of the grand jury was illegal. La.C.Cr.P., art. 533(l). More specifically, defendant/mover avers that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and the Fourteenth Amendment to the United States Constitution as well as Article I, section 2, Article I, Section 15 and Article I, Section 16, of the Louisiana Constitution.

6.

It is fundamental that defendant cannot be forced to go to trial on an indictment handed down by an unconstitutionally constituted grand jury. Johnson B. Puckett, 929 F.2d 1067 (5th Cir. 1991).

WHEREFORE, defendant prays that this Motion to Quash be heard; and thereafter the Motion to Quash be granted and the prosecution hearin be dismissed; and for full, general and equitable relief.

Respectfully submitted,

BY: S/Jesse Hearin
LAW OFFICE OF J. MICHAEL SMALL

JESSE B. HEARIN
P.O. BOX 1470
ALEXANDRIA, LA. 71303
(318) 487-8963

STATE OF LOUISIANA CRIMINAL DOCKET NUMBER 45,690-F

VS 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL EVANGELINE PARISH, LOUISIANA

MOTIONS
DECEMBER 2, 1993

PRESENT: HONORABLE PRESTON N. AUCOIN,
DISTRICT JUDGE

RICHARD W. VIDRINE, Assistant District Attorney, representing State of Louisiana;

MIKE SMALL, JESSE HEARIN, JAKE FONTENOT, representing the defendant;

TERRY CAMPBELL, Defendant, Not present.

BY THE COURT:

This is in the case of State of Louisiana versus Terry D. Campbell, Number 45,690, which is going to come before the Court on defendant's Motion to Quash the Grand Jury Indictment. The record will show that Mr. Campbell is present in court.

BY MR. SMALL, Counsel for Defendant:

No, sir, Mr. Campbell is not here.

BY THE COURT:
Okay. I just assumed it was Mr. Campbell. I hadn't even looked.

BY MR. SMALL, Counsel for Defendant:
That's my youngest son.

BY THE COURT:
Oh, is that your son?

BY MR. SMALL, Counsel for Defendant:
He's working with me. His grades weren't quite as good as they should be, Judge, and he's out for a semester. He's working in my office until he starts back to college In Lafayette.

BY THE COURT:
He goes to USL?

BY MR. SMALL, Counsel for Defendant-:
Yes, sir.

BY THE COURT:
Great. That's my school. Good Morning, Mr. LeJeune. Good Morning, Mr. Vidrine.

Let me ask you something. I don't think we have the Motion to Suppress yet. Have you filed it? Tina was asking about it.

BY MR. SMALL, Counsel for Defendant:
The motion was filed months and months ago.

BY THE COURT:
Okay. Fine. We thought it was recently filed.

BY MR. SMALL, Counsel for Defendant:
It was filed with the original motions, Your Honor.

BY THE COURT:
Then I'll just set it instanter. That's fine. I was just concerned that it wasn't in the record.

BY MR. SMALL, Counsel for Defendant:
It should be. I have a copy.

BY THE COURT:
I'll tell you what I'm going to do, I'm going to set it for 1:00 P.M. Is that satisfactory?

BY MR. SMALL, Counsel for Defendant:
Yes, Your Honor. Your Honor, I also should apprise the court at this time that on the way to the courthouse, as we speak, there is a supplemental motion to that suppression motion which has one additional ground.

BY THE COURT:
Do you have it?

BY MR. SMALL, Counsel for Defendant:
It is being sent as we speak. It will be here before 1:00 o'clock.

BY THE COURT:
All right. I simply said that the motion is set for 1:00 P.M. on December 2. All right. Let's see. Mr. Hearin, you are the mover. Let me ask you all something. Mr. Vidrine, you have examined the exhibits that are attached to the motion, haven't you?

BY MR. VIDRINE, Assistant District Attorney:
Yes, I have, Your Honor.

BY THE COURT:
Do you disagree with any of them?

BY MR. VIDRINE, Assistant District Attorney:
I have no reason to disagree with any of them, Your

Honor.

BY THE COURT:

All right. That's fine. Mr. Hearing, you may proceed at your pleasure.

BY MR. HEARIN, Counsel for Defendant:

Your Honor, I would like to start off by seeing if the State would stimulate to the attachments as far as evidentiary purposes so I would not have to call the workers in the Registrar of Voters Office.

BY THE COURT:

I think Mr. Vidrine is inclined to agree with that. Is that correct, Mr. Vidrine?

BY MR. VIDRINE, Assistant District Attorney:

That is correct, Your Honor.

BY THE COURT:

All right. I'm going to approve that stipulation, that the exhibits attached to the motion are correct.

BY MR. HEARIN, Counsel for Defendant:

Thank you, Your Honor. in light of the recent Supreme Court Decision in Dobie Gillis Williams versus John P. Whitely, the Warden, 93KD2709 is the Docket Number, which came out November 2 of this year. The Supreme Court...

BY THE COURT:

Let's put this thing in its proper perspective. Dobie Gillis Williams was a white man or a black man?

BY MR. HEARIN, Counsel for Defendant:

He was black.

BY MR. SMALL, Counsel for Defendant:

I was involved in the case post-conviction. The defendant

In Williams was black. His victim was a white woman.

BY THE COURT:

Okay. Thank you very much. You may proceed.

BY MR. HEARIN, Counsel for Defendant:

The Supreme Court stayed an execution and - in order to remand the District Court for an evidentiary hearing on the issue of discrimination in the Grand Jury Foreperson selection procedures.

BY THE COURT:

What do you understand that to mean? What would that evidentiary - I know what they said it was about. But, in essence what would be required more than what you have attached to your motion today.

BY MR. HEARIN, Counsel for Defendant:

At that hearing to carry our burden, Your Honor?

BY THE COURT:

No, in Dobie Gillis' case. What do you think that evidentiary hearing would consist of?

BY MR. HEARIN, Counsel for Defendant:

I think that evidentiary hearing would consist of - the first part of it would be the trial judge's ruling on whether the defendant carried his prima facie case.

BY THE COURT:

Okay. That would be in the record though.

BY MR. HEARIN, Counsel for Defendant:

If he determined that then the burden would shift to the state to prove that the discrimination, that the selection procedures were not discriminatory in nature...

BY THE COURT:

All right. That would be based on the percentages and everything that has reflected on these documents that you have attached to your motion?

BY MR. HEARIN, Counsel for Defendant:
The state's burden, Your Honor? The state's response could be based on the selection...

BY THE COURT:
It would have to be based on those statistics, wouldn't it?

BY MR. HEARIN, Counsel for Defendant:
They could use other evidence also, Your Honor, of the selection procedures employed by the judges when they select a grand jury foreman. In other words,...

BY THE COURT:
That is pretty well spelled out in the statute though - the grand jury selection process.

BY MR. HEARIN, Counsel for Defendant:
Right. But, the - in other words they would have to overcome the statistical analysis through - generally it would have to be other things because the numbers are constant.

BY THE COURT:
As I understand it and I say this for the record, as I understand it here in Evangeline Parish, especially between the years that you have designated in your motion, there has been no black grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:
That is true, Your Honor. I checked the last 35 grand jury forepersons and none of them were black.

BY THE COURT:
So, what more would you need at the evidentiary hearing?

BY MR. HEARIN, Counsel for Defendant:
The state would have to try and rebut the presumption that is raised by those numbers. That is what the evidentiary hearing would be...

BY THE COURT:
That satisfies me. That's a good answer. Okay.

BY MR. HEARIN, Counsel for Defendant:
Defendant has ... confessed racial discriminatory...

BY THE COURT:
That's what I meant to say. Now, let's get to that.

BY MR. HEARIN, Counsel for Defendant:
He has standing to contest racial discrimination in the jury context in selection of the jury. This is based upon Ohio versus Powers, 111 Supreme Court, 1364, 1991, U.S. Supreme Court case. In Ohio versus Powers it was preemptory challenges which were being used in a racially discriminary...

BY THE COURT:
It wasn't about grand jury forepersons.

BY MR. HEARIN, Counsel for Defendant:
No, it was not. But it showed that the excluded jurors had - the party who brought it who was not of the same race had standing to assert the rights of excluded jurors. That is what it stands for. In other words, when racial discrimination goes on in the jury selection context that is an injury to society as a whole and the actual person bringing the claim is not the importance. It is to rectify the damage to society as a whole in the appearance of discrimination in the selection procedures. This was in the regular trial jury context.

BY THE COURT:
Okay. What is the discrimination? Dobie Gillis was a

colored man. This man, Defendant Campbell is a white man. What is the discrimination?

BY MR. HEARIN, Counsel for Defendant:

The discrimination is that blacks do not get to sit as grand jury forepersons in Evangeline Parish.

BY THE COURT:

Okay. But you haven't answered my question. How does that discriminate against Campbell since he is not black.

BY MR. HEARIN, Counsel for Defendant:

Well, it discriminates against him in one manner in that if we hold today that Mr. Campbell does not have standing to assert this claim, then the grand juries in Evangeline Parish are valid to indict white people but not to indict black people. That is discrimination against Mr. Campbell.

BY THE COURT:

That is not the first time that something like that happens. I mean that is what it is all about. That is how the black persons got their rights determined by the court. I mean, certainly you had to have a different rule for them. You had to deviate from the old rule for black persons. I'm asking you why do vou have to do it for white persons.

BY MR. HEARIN, Counsel for Defendant:

For the reason I just stated in that the grand jury can't be constituted to indict only white persons.

BY THE COURT:

What you're saying - let me stop you. That you're saying lets look at this logically. You are saying that Defendant Campbell is a white man but he has been discriminated against because there has been no black grand juror forepersons. That's what you are saving. All right. You could carry that one step further. You could say that it is because the District Attorney is not black and he can't file a - in another case. Wait, I want you to answer my question.

Logically you could carry this to the D.A. Say the D.A. is not a black man so he can't file an information. Richard Vidrine is not a black man so he can't file an information against a white man. Is that what you are saying? I mean, how - where would it stop.

BY MR. HEARIN, Counsel for Defendant:

No, I'm saying that blacks in Evangeline Parish are being denied the right to sit as grand jury foremen.

BY THE COURT:

But, Mr. Campbell is not a black. That is my whole point.

BY MR. HEARIN, Counsel for Defendant:

But, Terry's rights have not been violated. Terry is asserting third party rights of those excluded.

BY THE COURT:

Now we are dealing with standing to complain. That's what we are arguing about.

BY MR. HEARIN, Counsel for Defendant:

That's correct, Your Honor. He has third party standing to assert the rights of those blacks who have been excluded in the grand jury foreman selection process...

BY THE COURT:

Let me ask you something, Mr. Hearin. Does this apply to women too? Supposing we would show that there has never been a woman foreperson in Evangeline Parish. Could men complain of that or could it be only women?

BY MR. HEARIN, Counsel for Defendant:

I believe that Ohio versus Powers dealt with race. So whether or not we extend to gender would be...

BY THE COURT:

Yes, but Ohio versus Powers is a challenge on voir dire.

BY MR. HEARIN, Counsel for Defendant:

That is true. But it stands for the proposition that society's interest in racially neutral selection procedures is society's interested the third party standing is allowed in that context because of the importance of the...

BY THE COURT:

But you know it says regardless of national origin, race, sex, economic status and so on and so forth. I mean, you know you have to admit that this is a very, very narrow thing. I mean, when you are citing in on the grand jury foreman - supposing you would have a - the eleven other members would be black. But the foremen would always have been white. It would still be tainted?

BY MR. HEARIN, Counsel for Defendant:

Well, Your Honor, one-twelfth of the selection of each grand jury is susceptible to abuse the way the system is set up right now. Due to our statistics we have raised the presumption that there has been abuse.

BY THE COURT:

Now, you see, if Mr. Campbell was a black man this would be making much more sense to me. You can appreciate that can't you?

BY MR. HEARIN, Counsel for Defendant:

Well, I think that I have case law in U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit, 1984.

BY THE COURT:

Okay. But, what do you do with Hobby versus United States, 468 U.S. 339, 104 Supreme Court 3093, 1984.

BY MR. HEARIN, Counsel for Defendant:

Hobby versus United States is not applicable. it is a due process claim.

BY THE COURT:

Okay. But why isn't this a due process why isn't this due process as well as equal protection of the laws?

BY MR. HEARIN, Counsel for Defendant:

I think a petitioner has a due process claim as well as a Sixth Amendment fair cross section claim and an equal protection claim.

BY THE COURT:

Okay. But, let's talk about Hobby. Isn't that the law? I mean, in Hobby, Hobby was a white male.

BY MR. HEARIN, Counsel for Defendant:

Hobby is in the Federal Grand Jury form in context and is a due process claim. In the Federal Grand Jury context all the grand jurors are selected and then the judge picks from them and therefore the rational of Hobby was that the grand jury foreman is a ministerial position. Contrary to that and much more similar to the facts in the Rose versus Mitchell which is...

BY THE COURT:

WAIT A MINUTE. The Federal judge still names the foreperson.

BY MR. HEARIN, Counsel for Defendant:

He does, but the grand jury has already been constituted and it has been constituted in a random fashion. In Louisiana eleven grand jurors are constituted in a random fashion. One is selected solely by the judge.

BY THE COURT:

That's not right.

BY MR. HEARIN, Counsel for Defendant:

That makes the selection process much more significant in that it taints the entire venire. The 5th Circuit has stated as much

in Geice versus Fortenberry ...

BY THE COURT:
What if the state does it like the federal judge.

BY MR. HEARIN, Counsel for Defendant:
Then perhaps an argument under Hobby could be made but it would have to be extended to the equal protection context as well if it was an equal protection argument. The two things that distinguish Hobby is it is due process and that the federal grand jury foreman - you already have a grand jury. It has been selected constitutionally. We just are going to decide who the one who is going to be in charge. In Louisiana we decide who is going to be in charge before we do the random lot. So, therefore, the susceptibility of abuse which is mentioned in the case law is much more prevalent in our situation. In other words, one twelfth of the jury could conceivably be picked in a discriminatory manner. In the federal system that's not possible. They could give on juror a little bit more statute...

BY THE COURT:
Just a minute. Of course, the federal judge has twelve of them. He picks one of them. He is discriminating - he's doing it. It's within his discretion. That's how he does it.

BY MR. HEARIN, Counsel. for Defendant:
Yes, he does, but he already has the entire grand jury selected. In Louisiana this taints not only the grand jury foreman context, but it taints the grand jury itself.

BY THE COURT:
What if the state judge would do it like a federal judge?

BY MR. HEARIN, Counsel for Defendant:
He might be able to argue under Hobby although I wouldn't conceive that a Louisiana grand jury foreman is ministerially in that context either. But the argument might be made.

BY THE COURT:
I follow you.

BY MR. HEARIN, Counsel for Defendant:
I think the applicable supreme court case is Rhodes vs Mitchell which looked at a Tennessee grand jury foreman being selected. That's 443, U.S. 545, in which the foreman was selected in much the same way as we do it here in Louisiana. And, there the supreme court said that selection without deciding the selection of the grand jury foreman itself would be subject to racial discriminatory claims in the equal protection context. Also there is case law, Peters versus Kiff in the United States Supreme Court, 407 U.S. 493, in which they said that race is of no relevance in that discriminatory context.

BY THE COURT:
Mr. Hearin, is there a federal decision that says that when the defendant is a white man and if he shows that there has never been any black foreperson serve on the ground jury that it is a denial of equal protection of the law. Is there a federal decision?

BY MR. HEARIN, Counsel for Defendant:
U.S. versus Snead, 729 F 2nd, 1333, 11th Circuit 1984 stands for that proposition.

BY THE COURT:
What about Hobby? That's the Supreme Court.

BY MR. HEARIN, Counsel for Defendant:
But, it's not applicable to our facts, Your Honor. It wasn't looking at a state selected grand jury foreman. It was looking at it federally and because the difference...

BY THE COURT:
That's how you distinguish it.

BY MR. HEARIN, Counsel for Defendant:
That's how I distinguish Hobby, Your Honor.

BY THE COURT:
Okay. Very good.

BY MR. HEARIN, Counsel for Defendant:
I would also point the language of Guice versus Fortenberry, 5th Circuit, 661 F2nd 486, 1981 in which language to the effect of prejudice to the defendant himself is not - I'm paraphrasing, Your Honor, - prejudice to the defendant. Which, of course, is the traditional equal protection inquiry injury in fact and I would submit that Guice versus Fortenberry, Piers versus Kiff, U.S. versus Snead, Rhodes versus Mitchell and Ohio versus Powers stand for the proposition that a white defendant has third party standing to assert the black citizens right to be selected to a grand jury. He only has the right if we were able to prove our case to sit on eleven twelfths of the grand jury here. One spot is not available.

BY THE COURT:
Let me ask you this. If your client was charged with a lesser offense, let's say he was charged with aggravated battery, all right, do you believe that a white District Attorney or a - if you have only had white District Attorneys that they could file an information against him?

BY MR. HEARIN, Counsel for Defendant:
I do believe so, Your Honor.

BY THE COURT:
Okay. What is the difference?

BY MR. HEARIN, Counsel for Defendant:
Well, the difference is first of all the defendant has a right under state law for the offense he is charged with to be indicted by a grand jury.

BY THE COURT:
He has rights too if it is a bill of information that has been filed against him. What is the difference?

BY MR. HEARIN, Counsel for Defendant:
The District Attorney is an elected position. The grand jury foreman is a person selected by the judge who is the similar...

BY THE COURT:
In the federal system they are not elected. No, sir, the District Attorneys are not elected in the federal system.

BY MR. HEARIN, Counsel for Defendant:
They are not selected by the judge.

BY THE COURT:
They are selected by the President.

BY MR. HEARIN, Counsel for Defendant:
They are selected by the President, but the difference is that in the Louisiana context the judge selects the person who is going to be there. The judge is supposed to be epitomy of neutrality. He is
the symbol of fairness. He is the symbol of the court.

BY THE COURT:
But ... say that he is not.

BY MR. HEARIN, Counsel for Defendant:
I'm saying that that is why there is concern in this area of the law for this and especially to - it is even more compelling here than in the peremptory challenge context because there the D.A. and the defense attorney adversarials are trying to do something on behalf of their client. Here in selecting a grand jury foreperson there can be no other reason than fairness and equality for the judge to make the selection. There is no...

BY THE COURT:
You don't have any evidence before this court that the grand jury was not fair.

BY MR. HEARIN, Counsel for Defendant:

I don't submit that...

BY THE COURT:
You're not even arguing that, are you?

BY MR. HEARIN, Counsel for Defendant:
I'm not arguing that - that there was not, as far as their determinations, I haven't even done that research or given it much thought, Your Honor.

BY THE COURT:
I'm looking at this thing very close, Mr. Hearin. I want you to know that. I read all of your brief and I read everything that you filed. I'm very interested in this and I want you to know it. I think you are making a good argument.

BY MR. HEARIN, Counsel for Defendant:
I would just also emphasize some case law in which - well, actually I'd like to move on to the prima facie case, Your Honor, if you are...

BY THE COURT:
All right.

BY MR. HEARIN, Counsel for Defendant:
In order to show a prima facie case the defendant must show that a recognizable distinct group was discriminated against. He must prove the degree of underrepresentation was - by comparing the general population as we did in our affidavit.

BY THE COURT:
That has been done. In fact,....

BY MR. HEARIN, Counsel for Defendant:
One and two have been met. I think we would all agree.

BY THE COURT:
From your point of view there is more over here than there

was in Sabine Parish.

BY MR. HEARIN, Counsel for Defendant:
That's true. In Sabine Parish it was 14 to 16%.

BY THE COURT:
Figures don't lie. I understand that.

BY MR. HEARIN, Counsel for Defendant:
Here it is 23.25% eligible voters. I think the battle ground prima facie case is selection procedures susceptible to abuse. Actually I don't think there is as far as putting on a prima facie case I don't think we really have a significant...

BY THE COURT:
But that is contingent on the court finding that Campbell is standing to complain.

BY MR. HEARIN, Counsel for Defendant:
Absolutely right.

BY THE COURT:
Okay.

BY MR. HEARIN, Counsel for Defendant:
So in order to satisfy the three tests I would submit it is beyond dispute - a recognizable distinguishable group is blacks in America. I could cite Johnson versus Puckett a Fifth Circuit Court opinion, 1991. I can get you the cite on that.

BY THE COURT:
It's in your brief. You have it in your brief, don't you?

BY MR. HEARIN, Counsel for Defendant:
Yes, Your Honor.

BY THE COURT:
I read your brief.

BY MR. HEARIN, Counsel for Defendant:

So, being prone to the under representation by comparing, uh, clearly our actual disparity is 23.25%, also the fact that zero have been chosen tends to be emphatic because I mean when zero are chosen as the Fifth Circuit said nothing is emphatic as zero. That's again from Johnson versus Puckett. So, since there is 23.25% eligible and zero have been chosen that is an actual disparity and, uh, in U.S. versus Hernandez 672 F 2nd, 1380 at Page 1387, Eleventh Circuit case 1982, the court held that 14.6 actual disparity was clearly under representation. So, in other words, the difference between the eligible population and the percentage shown, which is our case is zero.

BY THE COURT:

uh-huh.

BY MR. HEARIN, Counsel for Defendant:

In the third - I think he has met - the third simply requires that the selection procedure is susceptible to abuse. At this stage of the proceedings I don't have to show that it is evil intent or that abuse has occurred, but clearly if a person wanted to abuse the procedure as it stands they could. if there were someone who wanted to appoint only Chinese people to the grand jury foreman position they could under the law.

BY THE COURT:

Let me stop you for a moment. Let's say that you are correct. Now, all of this has, so for, has come before the court on post-conviction relief. As far as I know this is the first one that has been argued before the trial. Isn't that correct? There may be some others throughout the state, but I don't know of them.

BY MR. HEARIN, Counsel for Defendant:

The law that I have-seen has come in...

BY THE COURT:

I mean Dobie Gillis was post-conviction.

BY MR. HEARIN, Counsel for Defendant:

That's true, Your Honor.

BY THE COURT:

All right. Now, what I want to ask you. Let's assume for the purposes of this question that, you are correct and I sustain you. That's going to wipe out all of those convictions that were ever this would wipe out all Evangeline Parish convictions where there was a grand jury indictment?

BY MR. HEARIN, Counsel for Defendant:

They would have to have their own hearing and they could go back to the grand jury that indicted...

BY THE COURT:

Yes, but we know the answer. Every grand jury that indicted them had a white foreman.

BY MR. HEARIN, Counsel for Defendant:

It would depend on....

BY THE COURT:

I mean it would wipe them all out - even though ten years ago, twelve years ago, twenty years ago, two years ago - you'd wipe them all out?

BY MR. HEARIN, Counsel for Defendant:

Well, each defendant would have to show his own time period. Okay? Our ...

BY THE COURT:

No, but look, each defendant would show exactly what you are showing for Campbell. They would probably find your brief and submit that. Your figures don't lie.

BY MR. HEARIN, Counsel for Defendant:

They could show, perhaps someone that had been indicted

in 1986 could show that, uh, that ...

BY THE COURT:
I think Dobie Gillis was ...

BY MR. HEARIN, Counsel for Defendant:
...the time frame is not relevant. I would submit that if we rule on that this does not win only on standing then we would still have the same problem with all the blacks who had ever been indicted.

BY THE COURT:
Because you know, let me tell you if I rule that way or if a court higher than me rules that way you know what you're doing. You know what door you are opening?

BY MR. HEARN, Counsel for Defendant:
I do know that, Your Honor.

BY THE COURT:
Proceed.

BY MR. HEARN, Counsel for Defendant:
I do submit that in each case it would be individual and no I don't know the answer...

BY THE COURT:
Yes, you say that, but as a matter of fact it wouldn't be individual. They don't have the same motion. Look it would circulate through the penitentiary. I can see it. We would have catalogs of them.

BY MR. HEARN, Counsel for Defendant:
And I do not know the retro-activity question as far as ...

BY THE COURT:
Now, you're cooking. That is what - you touched on something good there. I think the court would have to deal with

that, don't you? I don't think they could make it go back to 1900. There might be some still in jail since 1900 I don't know. I doubt it.

BY MR. HEARIN, Counsel for Defendant:
Perhaps. My point being that the remedy in this situation and the fact that...

BY THE COURT:

The remedy you want is to quash the indictment. That's what you want.

BY MR. HEARIN, Counsel for Defendant:
Before trial.

BY THE COURT:
That's why we are here today and the trial is Monday.

BY MR. HEARIN, Counsel for Defendant:
That's true, Your Honor, but I submit that if it is relevant, if it is allowed to do it after the conviction it's silly not to deal with it before the trial.

BY THE COURT:
According to the Louisiana Law I think you are supposed to do it before the trial. Motions to Quash, you know, to raise issues like that it is proper. Your motion is properly brought. I'm not saying that it is not, you understand, and I don't think that the state is going to object that you can file a Motion to Quash prior to the commencement of the trial. It is just that this raises all kinds of issues, Mr. Hearin.

BY MR. HEARIN, Counsel for Defendant:
I recognize the practical implications.

BY THE COURT:
You understand that.

BY MR. HEARIN, Counsel for Defendant:
Simply stated that the law as it stands has a remedy for this situation. That remedy is before trial to quash the indictment.

BY THE COURT:
How would we do that? Let's say that you are right and not start. Okay. Then I would have to say, Evangeline Parish has - what - 23.8G% or something like that.

BY MR. HEARIN, Counsel for Defendant:
23.25% blacks.

BY THE COURT:
So -then I would have to say, all right, we have two grand jurys a year and let's figure out the percentage. That would be roughly one-fourth. So it would be one-fourth black and three fourths white. That would mean that every fourth grand jury would have to have one black foreperson. Right?

BY MR. HEARIN, Counsel for Defendant:
That's not correct Your Honor.

BY THE COURT:
Okay. Tell me why it is not.

BY MR. HEARIN, Counsel-for Defendant:

The selection procedure would have to be racially neutral which is what the state...

BY THE COURT:
Yes, but that's not what you're saving. Let me tell you something. That's not what you are saying. You are saying that because Evangeline Parish is nearly 24% black that we would have to figure out a way to have a black foreperson approximately 24% of the time. That's what you are saying.

BY MR. HEARIN, counsel for Defendant:

No, I'm not.

BY THE COURT:
Then what are you saying?

BY MR. HEARIN, Counsel for Defendant:
I'm saying that that establishes a prima facie case...

BY THE COURT:
All right. Look, let's get practical over here. How do you want the court to select a foreman from now on If you win your argument.

BY MR. HEARIN, Counsel for Defendant:
I would leave that up to the court, Your Honor.

BY THE COURT:
Well, of course you would. That's a good way to dump it off. The court would have to - you know what you are saying. You are saying regardless, regardless of anything, you do admit that you are not attacking this grand jury as not being fair. RIGHT? You said you weren't. But, you are telling me I have to figure out a way because of the percentages, that I have to figure out a way of appointing black people, ladies or men, to the grand jury. So, I want to know how will I do it? Every other time, one out of three, one out of four, two to-one. All the time.

BY MR. HEARIN, Counsel for Defendant:
No, I don't think it would be done on a statistical basis like that.

BY THE COURT:
If that is so then why did you figure out all those percentages and why did the Supreme Court in Sabine Parish figure out all the percentages?

BY MR. HEARIN, Counsel for Defendant:
Because once it is shown the Supreme Court wants a

racially neutral selection procedure. Not necessarily numerical to be designed. It points out a possible problem in the system and...

BY THE COURT:

Let me make my point clearer. Sabine Parish is between 14 and 16. Evangeline has just about 24. How many black - in a ten year period how many black foreman would you have to have in Sabine Parish and how many black would you have to have in Evangeline Parish. Evangeline Parish is about 10% more.

BY MR. HEARIN, Counsel for Defendant:

Well, would probably have to have an actual disparity between the population of something less than 14.6%.

BY THE COURT:

I'm just pointing out to you the difficulty that the court would have - that the court may have. You understand? Okay. Proceed. You are making a very good argument and you must not believe that I'm picking at you. I think you wrote a real good brief and I think your argument is very, very persuasive and I think you are handling it very well.

BY MR. HEARIN, Counsel for Defendant:

I'm not concerned about you picking at me, Your Honor.

BY THE COURT:

That's good.

BY MR. HEARIN:, Counsel for Defendant:

I think simply the way the law is set up, and I'll conclude on this note, is that the statistical analysis makes the court look at it in an evidentiary hearing. If the state cannot overcome that then it is time to look and see why those numbers came up.

BY THE COURT:

That's - okay - we're right back where we started from. You want me to hold an evidentiary hearing?

BY MR. HEARN, Counsel for Defendant:

I would submit that we have carried our burden to show a prima facie case.

BY THE COURT:

I've asked you this question and I - there's one that you haven't satisfactorily answered. What kind of evidentiary hearing would we have. The District Attorney has already agreed that all of your figures, and your statistics, and your things that you appended to your motion are correct. So, what would you want? You would want him to bring the other judges, that we hear all these judges that are still alive and ask them how them pick juries. I tell you what they would say. They would say that they selected the foreman. That's what they would tell you.

BY MR. HEARN, Counsel for Defendant:

That's true. But, the D.A. would have the opportunity to show that that despite the numbers they came up by chance. It is conceivable possible.

BY THE COURT:

But not when you say they are all white. I mean, I don't think there is anybody in this courtroom that disputes the fact that there has never been a black grand jury foreperson in this parish. So, what kind of evidence would Mr. Vidrine put on?

BY MR. HEARN, Counsel for Defendant:

He would have to put on evidence of objectively neutral procedures that have been practiced during that time span and that they were practiced and yet we still had 35 in a row. That would be his burden and it is a big burden I admit.

BY THE COURT:

Not a big one an impossible one. Okay. You're doing good. You want Richard to argue now and then you want to refute what he is going to say?

BY MR. HEARN; Counsel for Defendant:

That would be fine. I would close by saying I do believe that we have carried the burden on the prima facie case at this time.

BY THE COURT:
All right. This is what I'm going to do. I'm going to let Mr. Vidrine argue and then I'm going to let you come back and refute what he says. Mr. Vidrine. Look, I don't want to tell you how to argue and but I'm interested primarily in this standing to claim. I think it is two things. I think it is denial of equal protection of laws and due process. That is how I see it. And, I would like to know whether or not since Campbell is white he has a standing to ...

BY MR. VIDRINE, Assistant District Attorney:
Our position, Your Honor, is very simple. In this particular case...

BY THE COURT:
Yes, in this particular case. Well have to take one at a time.

BY MR. VIDRINE, Assistant District Attorney:
Yes, sir. In this particular case and we're not conceding about any other case or any other scenario or any other...

BY THE COURT:
No, no, this is the case sub judice. Okay.

BY MR. VIDRINE, Assistant District Attorney:
We have a white defendant, we have a white grand jury foreman.

BY THE COURT:
And you have a white victim.

BY MR. VIDRINE, Assistant District Attorney:
And we have a white victim. We suggest to the court that he, Terry Campbell, does not have standing in this court. The defendant's group in order for him to seek relief he has to show

that the defendant's group is one that is a recognizable distinct class singled out for different treatment. He can't show that. He has not shown that.

BY THE COURT:
Because he is white.

BY MR. VIDRINE, Assistant District Attorney:
Because he is white he has no standing. If he were not white, if he were black, perhaps we would have a different situation.

BY THE COURT:
Or perhaps Chinese, or Asian or Hispanic or something like that. Okay.

BY MR. VIDRINE, Assistant District Attorney:
But that is our situation. He does not have standing because he is white and he just doesn't have standing.

BY THE COURT:
All right. Now, listen. Let me ask you something. What if I find standing what do you say about that?

BY MR. VIDRINE, Assistant District Attorney:
Well, Your Honor, if you find standing and if vou find that there is a substantial degree of under representation when comparing the proportion of the group and the total population to the proportion...

BY THE COURT:
This is what I know, Mr. Vidrine, and you know it and we all know it. We know that we have nearly 24% of our people in this parish who are black people.

BY MR. VIDRINE, Assistant District Attorney:
Correct.

BY THE COURT:

We know that. We also know that there has never been a black foreperson on the grand jury. We know that. We have had black foremen on petit juries and we've had them in civil juries, but you have not had them on grand juries. We also know that Campbell is white. We know that the foreperson who sat in on the grand jury was white. And, we know that the victim, Mr. Sharp, was white. Now, those are things that we know and we have to accept. We know the percentages and we know everything. Okay. I think that the standing is the big issue.

BY MR. VIDRINE, Assistant District Attorney:

So do I.

BY THE COURT:

Okay. if you have finished. Now, Mr. Hearn, I'm a firm believer that each lawyer is the architect of his own case. I only suggest, you understand, I don't tell you what to do. But, I think if you want to refute this you should refute the standing argument first.

BY MR. HEARN, Counsel for Defendant:

Yes, Your Honor. According to that rational we could pick all white grand juries and white people would have no standing to assert that, you know, that the selection process was wrong. I mean, if only a white and besides we're missing the boat on that the white defendant is asserting the right of the excluded blacks. That's the rational of the equal protection claims.

BY THE COURT:

But look at how this thing is impossible though. Supposing Mr. Campbell was black. Could Mr. Campbell argue that he wants a white foreman?

BY MR. HEARN, Counsel for Defendant:

Certainly if there was a discriminatory record over the years that the selection process is tainted. I would also submit that if the selection process is substantially defective for any reason,

race or otherwise, any action that the grand jury takes against black, white or any male or females, true bill or no true bill is per se substantially defective on it's face.

BY THE COURT:

Okay. Now you see you are saying male and female. All right. Supposing that Mr. Campbell was a woman, and Mr. Campbell would say, all right, I went check all the records. Mr. Hearin went and checked all the records. There has never been a female grand jury forelady, foreperson, in Evangeline Parish. Would we be arguing the same think today?

BY MR. HEARN, Counsel for Defendant:

There could be an argument made.

BY THE COURT:

Yes, because the thing says regardless of sex, nationality...

BY MR. HEARN, Counsel for Defendant:

Although that is not true there have been female grand jury foremen.

BY THE COURT:

It was a hypothet really, you know. I didn't mean to mislead you. I meant it as a hypothet. We could take the Parish of Utopia and say look there has never been a female foreperson. So, I'm a female defendant and I want the indictment quashed because there has never been a female on the grand jury as a foreman.

BY MR. HEARN, Counsel for Defendant:

Once again, Your Honor, I don't think it would necessarily matter other than clearly the Supreme Court has extended him the racial discrimination context of third party standing. Now, whether that would go to gender or not maybe an issue at that hearing which would be difference from ours. I submit that there is clear law out in the racial discriminatory context because of the history of it that gives third party standing to those who are excluded and the defendant, regardless of his race, can raise it for the good of

society as a whole, so that our grand juries and our trial juries are not selected in a discriminatory fashion so it doesn't diminish the public's faith in our judicial system is the basic rational in Rhodes versus Mitchell and the cases I've cited in my memorandum.

BY THE COURT:
Okay. I guess we've just about beat a dog to death over here. But - go ahead.

BY MR. HEARN, Counsel for Defendant:
Let me add that I have not seen in the standing analysis that I have read any reference to the practical difficulties as to the remedy as to why the person does or does not have standing.

BY THE COURT:
Okay. And before I let you sit down. You think this is only an equal protection problem or it is also a due process problem.

BY MR. HEARN, Counsel for Defendant:
I think the defendant has equal protection claims, due process claims and fair cross section claims.

BY THE COURT:
I agree with you. That's the problem. I agree with you. Okay.

BY MR. HEARN, Counsel for Defendant:
Can I add one thing, Your Honor.

BY THE COURT:
Certainly. In this court time is of no moment.

BY MR. HEARN, Counsel for Defendant:
As to the fair cross section I would simply, which is in my memorandum, Rule 25 of the Supreme Court which shows the court's allegiance to the fair cross section requirement.

BY THE COURT:

Okay. Mr. Vidrine do you have anything?

BY MR. VIDRINE, Assistant District Attorney:
The only thing I would add, Your Honor, in the case of U. S. Supreme Court case of Castaneda versus Partida, 430 U.S. 482, where it sets out the three prong test. In that case it shows that once the defendant has shown substantial under representation of his group.

BY THE COURT:
Yes, but that's after you find standing.

BY MR. VIDRINE, Assistant District Attorney:
To find standing.

BY THE COURT:
Yes, so they dovetail together. Okay. Gentlemen, Im going to rule. Now, in the event that this is transcribed it is going to constitute this court's written reasons for judgment on this Motion to Quash the Grand Jury Indictment. Of paramount importance to the court here is whether or not the Defendant Campbell has standing to raise the issue of equal protection and/or due process in the grand jury foreperson selection contest in the 13th Judicial District, Evangeline Parish, Louisiana. Should this court rule that he lacks this standing the court will need go no further and the Defendant Campbell's Motion to Quash the Grand Jury indictment will be denied. In this case it is undisputed that both the Defendant Campbell and the dead victim Sharp are white men. It is also undisputed that the foreperson who sat on this grand jury, was a white man. Therefore, the real burning issue before this court is how does the exclusion of negroes from the position of grand jury foreperson violate Defendant Campbell, a white man's constitutional equal protection and/or due process rights. I remind you, all of you, that I am only dealing with the case sub judice, the case before me today. Gentlemen, how can the exclusion of negroes from the position of grand jury foreperson, keeping in mind that the grand jury is an accusatory body. How can that impair the confidence of Defendant Campbell, a white man, in the

administration of criminal justice. How can Defendant Campbell, who approached the court for selecting a foreperson of his own race to a grand jury that has accused him of killing white man another member of his own race. How can such a procedure cast a doubt upon the integrity of the judicial process. How, can Defendant Campbell, a white man, be prejudiced by the court appointing a foreperson who is also a white man. Is Defendant Campbell prejudiced because the grand jury foreperson was a white man? How can such a procedure place the fairness of a criminal proceeding in doubt. How can Defendant Campbell, a white man, complain that the foreperson, another white man, who sat on the grand jury that indicted him was tainted. And, as far as that goes all the other white forepersons who sat on the Evangeline Parish grand juries in the past at least from 1;76 to present, were tainted. How can Defendant Campbell argue that he was racially discriminated against. This Court answers all the above questions in the negative. There is no claim here that the grand jury that indicted Defendant Campbell was one that was selected at random and from a fair cross section of Evangeline Parish, the 13th Judicial District. There is no claim that that wasn't how it was. There is no claim that the members of the grand jury who indicted him were excluded on the count of race, color, religion, sex, national origin or economic status. And, there is on the books, the United States Supreme Court decision of Hobby versus United States, 468 US 339, 7045 Supreme Court 3993 (19984), which holds that the discrimination in the selection of a federal grand jury foreperson does not constitute a violation of due process. Hobby was a white man seeking relief under the due process clause of the Fifth Amendment. Just as Defendant Campbell is doing here under the equal protection clause, but by admission of counsel also under the due process clause.

The court holds that in the case subjudice there is no racial discrimination in the process used in Evangeline Parish, Louisiana against the Defendant Campbell. Again I'm restricting all of my comments to this one particular case that we're here on this morning.

This court rules that the Defendant Campbell, being a white man accused of killing another white man, Mr. Sharp, was not denied equal protection of the laws and/or due process because of the grand jury foreperson selection process in the past up to the present, where all of the forepersons were white. Therefore, Defendant Campbell has no standing to raise that issue. That being the case the court need not consider the other issues. The Motion to Quash the Indictment is denied. Mr. Vidrine, you will prepare a judgment to that effect and submit it to me for signature hopefully while Mr. Hearin and Mr. Small are still here during the day.

BY MR. VIDRINE, Assistant District Attorney:
Yes, sir.

BY THE COURT:
Gentlemen, that is my ruling. Thank you very much.

BY MR. HEARIN:, Counsel for Defendant:
Your Honor, I would like to respectfully object to your ruling and...

BY THE COURT:
Certainly.

BY MR. HEARIN:, Counsel for Defendant:
... and seek a delay for seeking writs.

BY THE COURT:
You have a perfect right to seek writs, but there is going to be no delay and there is going to be no stay order granted. If you want to take writs tell her right now so she can go type it up.

BY MR. HEARIN:, Counsel for Defendants:
We'd like to confer on whether we actually want to take a writ.

BY THE COURT:
You understand that the bird of time is on the wing over

here.

BY MR. HEARIN:, Counsel for Defendant:
I understand.

BY THE COURT:
You'll have to tell her if you want just my ruling or if you want all of the colloquy. If you want all of the colloquy it is going to be a much bigger job. If you want only my ruling and then the colloquy is going to be your argument in the brief to the Court of Appeals and/or the Supreme Court - I know you file them with both courts. But, whatever you decide. We're at your disposal and - the only thing I'm asking you is - her name is Kellie - let Kellie know as soon as you can.

BY MR. HEARIN, Counsel for Defendant:
Yes, sir, Your Honor. I just wanted to protect our right to...

STATE OF LOUISIANA **CRIMINAL DOCKET NO. 45,690-F**

Dec 6 1203 pm '93

VERSUS **13TH JUDICIAL DISTRICT COURT**

TERRY CAMPBELL **EVANGELINE PARISH, LOUISIANA**

JUDGMENT

This case came for hearing on the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** which hearing was held on December 2, 1993.

APPEARANCES: Defendant, **TERRY CAMPBELL,** and his attorney's, J. Michael Small, Jesse Hearin and Raymond LeJeune, appearing for J. Jake Fontenot;
and
The State of Louisiana, represented by Richard W. Vidrine, Assistant District Attorney;

For the reasons orally assigned in open court, after the hearing of this case:

IT IS ORDERED, ADJUDGED AND DECREED that the "MOTION TO QUASH GRAND JURY INDICTMENT" filed by defendant, **TERRY CAMPBELL,** be and the same is hereby denied.

JUDGMENT rendered on December 2, 1993.

JUDGMENT read and signed on this 6th day of December, 1993, at Ville Platte, Evangeline Parish, Louisiana.

S/Preston N. Aucoin
PRESTON N. AUCOIN
DISTRICT JUDGE

S/12-6-93
This is to certify that a copy
of the above and foregoing
S/Judgment
Has been mailed to:
S/Richard Vidrine
S/Mike Small
S/Jake Fontenot
S/TCA Deputy Clerk of Court

FILED S/5 20- 19 S/94
S/A.F.D. Dy. Clerk

CRIMINAL DOCKET NO. 45,690-F

STATE OF LOUISIANA	: 13TH JUDICIAL DISTRICT COURT
VERSUS	: PARISH OF EVANGELINE
TERRY D. CAMPBELL	: STATE OF LOUISIANA

Filed:_____ : _____ Dy Clk

MOTION FOR NEW TRIAL

NOW INTO COURT comes the defendant, TERRY D. CAMPBELL, through undersigned counsel, and he does, with respect, move a new trial pursuant to Louisiana Code of Criminal Procedure, Article 851 (1), (2) and (5). He affirmatively alleges that injustices have been done to him for which he is entitled to a new trial.

1.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that the verdict is contrary to the law and the evidence. More particularly, the evidence does not establish beyond a reasonable doubt that the defendant, TERRY D. CAMPBELL, intended to kill James L. Sharp. Moreover, the evidence does not establish beyond a reasonable doubt that the defendant, TERRY D. CAMPBELL, intended to inflict great bodily harm upon James L. Sharp.

2.

A new trial should be granted to defendant, TERRY D.

CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (1), for the reason that clearly the preponderance of the evidence establishes the defense of insanity at the time of the offense - that is. that the circumstances indicate that because of a mental disease or defect the defendant, TERRY D. CAMPBELL, was incapable of distinguishing between right and wrong with reference to the conduct in question.

3.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on a written motion made during the proceedings shows prejudicial error in that the Court overruled the defendant's Motion to Quash Grand Jury Indictment. More particularly, defendant, TERRY D. CAMPBELL, was charged by a grand jury indictment which was returned by a grand jury which was illegally and unconstitutionally selected in that the grand jury foreperson selection process in Evangeline Parish is discriminatory and violates the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article 1, Section 2, Article 1, Section 15, and Article 1, Section 16, of the Louisiana Constitution. It is fundamental that a defendant cannot be forced to trial on an indictment handed down by an unconstitutionally constituted grand jury. See *Johnson v. Puckett,* 929 F.2d 106 (5th Cir. 1991).

4.

A new trial should be granted to defendant, TERRY D. CAMPBELL, under the provisions of Louisiana Code of Criminal Procedure, Article 851 (2), for the reason that the Court's ruling on the issue of the defendant's present capacity to proceed is prejudicial error and resulted in an injustice being done to the defendant for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him or to assist in his defense remained with him throughout the proceedings and exist to this date. In this

connection, the defense urges not only the evidence presented to the Court at the sanity hearings conducted on January 8, 1993 and June 11, 1993, but also the evidence adduced during the course of the trial conducted on May 9, 10, 11, and 12, 1994. The defendant's condition was such that he could not regain his capacity to proceed.

5.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on November 12, 1993, which overruled defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial is prejudicial error which resulted in an injustice being done to the defendant. In additional, the Court's subsequent ruling on November 23, 1993, which overruled defendant's oral Motion for Limiting Expert Witnesses was prejudicial error which resulted in an injustice being done to the defendant, TERRY D. CAMPBELL.

6.

A new trial should be granted to defendant, TERRY D. CAMPBELL, for the reason that Court's ruling on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress is prejudicial error which resulted in an injustice being done to the defendant. In addition to the prejudicial error which the defendant suffered as a result of the ruling which the Court made on December 2, 1993, on the written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, the defendant, TERRY D. CAMPBELL, had an injustice done to him as a result of the rulings the Court made during the course of the trial on the oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause). In this connection, the defense urges not only the testimony and exhibits presented to the Court on

December 2, 1993, at the hearing on the Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress, but also the testimony of L. C. Deshotel and Jack Aucoin given on January 11, 1994, during the first trial, as well as the testimony of L. C. Deshotel and Jack Aucoin given on May 10, 1994, during the second trial, and the testimony of Dr. Donald C. Harper, Dr. Jimmy Cole, Dr. William Cloyd, Dr. Lyle LeCorgne, Dr. Paul Ware, Dr. Richard L. Gibson, Dr. Jay C. Pennington, Dr. Phillip Landry and Dr. Charles Fontenot given on May 11 and 12, 1994. Among other things, the cumulative effect of this testimony shows that the defendant, TERRY D. CAMPBELL, could not have understood, remembered, and waived his constitutional rights at the time the statements were alleged to have been given.

7.

A new trial should be granted for the reason that the Court refused to give defense requested jury charges number 2, 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

8.

A new trial should be granted for the reason that Court refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

9.

A new trial should be granted for the reason that Court overruled the defendant's written objections to the proper general jury charges which said objections were tendered to the Court timely in a document entitled "Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred

to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or non-enumerated felonies nor did the Court's general charge define the enumerated or non-enumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

10.

A new trial should be granted for the reason that Court declined to sustain defense objections to the proffered general jury charges and declined to remove from the general charges the following language, to-wit:

A) At page 6 of the proffered general jury charges:

> "Specific intent or premeditation may be implied from certain acts; for example, when it is established that an accused laid in wait for his (or her) alleged victim; when an accused made previous threats against the deceased; when there existed between the defendant and the deceased former grudges; when a accused arms himself (or herself) beforehand, or from any other facts observable by the senses, which show a previously planned scheme to commit a crime.
>
> Specific intent, or premeditation, may also be implied when there are no external signs of it beyond the mere fact of the killing; for instance, when there was no lawful reason for it; and when the killing is without provocation, or upon so slight provocation as to not justify it."

B) At page 7 of the proffered general jury charges:

> " . . . either Article 30 (first degree murder), or..."

C) At page 7 of the proffered general jury charges:

"(2) A homicide committed, without any intent to cause death or great bodily harm:

(a) When the offender is engaged in the perpetration or attempted perpetration of any felony not enumerated in Articles 30 and 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Articles 30 or 30.1.

It will be noted that the article just read to you states that 'Manslaughter is (1) a homicide which would be murder under Subdivision (1) of Article 30.1 (Second Degree Murder). but the offense is committed in sudden passion', etc."

D) At page 8 of the proffered general jury charges:

"Next, the manslaughter article makes it a crime to kill a person unlawfully, even though the accused did not intend to cause death or great bodily harm, if the accused as the time he (or she) delivered the fatal blow, was engaged in the perpetration or attempted perpetration of any intentional misdemeanor directly affecting the person."

E) At page 10 of the proffered general jury charges:

"if you find that the defendant established by a preponderance of the evidence the defense of insanity at the time of the offense, then your

verdict should be 'We, the Jury, find the defendant not guilty by Reason of Insanity'."

11.

A new trial should be granted under the provisions of Louisiana Code of Criminal Procedure, Article 851 (5), which provides:

"... The court, on motion of the defendant, shall grant a new trial whenever:

. . .

(5) The court is of the opinion that the ends of justice would be served by the granting a new trial, although the defendant may not be entitled to a new trial as a matter of strict legal right."

It is obvious for the reasons urged above, among others, that the ends of justice would be served by granting the defendant, TERRY D. CAMPBELL, a new trial. The various rulings indicated above show that injustices have been done to the defendant which constitute prejudicial error and the jury which returned the verdict did not properly apply the law with respect to present insanity and failed to implement R.S. 14:14, and Louisiana Code of Criminal Procedure, Article 652, which, respectively, provides:

"If the circumstances indicate that because of a mental disease or defect the offender was incapable of distinguishing between right and wrong with reference to the conduct in question, the offender shall be exempt from criminal responsibility." R.S. 14:14.

"The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence." C.Cr.P. Art. 652.

WHEREFORE, IT IS PRAYED that after a contradictory hearing with the District Attorney or Assistant District Attorney representing the State of Louisiana in the Thirteenth Judicial District, that judgment be rendered herein granting the defendant, TERRY D. CAMPBELL, a new trial in accordance with law.

Respectfully Submitted By
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STATE OF LOUISIANA — CRIMINAL DOCKET NUMBER 45,690-F

VS — 13TH JUDICIAL DISTRICT COURT

TERRY CAMPBELL — EVANGELINE PARISH, LOUISIANA

SENTENCING

MOTIONS

May 20, 1994

PRESENT: HONORABLE PRESTON N. AUCOIN,
DISTRICT JUDGE

RICHARD W. VIDRINE, Esquire, Assistant District Attorney, Post Office Box 780, Ville Platte, Louisiana 70586, representing the State of Louisiana;

RICHARD V. BURNES, Esquire, Attorney at Law, Post Office Box 650, Alexandria, Louisiana 71309, representing the defendant;

RAYMOND LEJEUNE, Esquire, Attorney at Law, 1401 Poinciana, Mamou, Louisiana 70554, representing the defendant;

TERRY CAMPBELL, Defendant.

BY THE COURT:

. . . Now, let's go to Number 3.

BY MR. BURNES, Counsel for Defendant:
Yes, Your Honor.

BY THE COURT:
Now, Number 3, Mr. Burnes, we went through that the first time round...

BY MR BURNES, Counsel for Defendant:
Yes, sir.

BY THE COURT:
...is when Dobie Gillis first came out. We had a big hearing concerning that. I'm sure you read it in the record already.

BY MR. BURNES, Counsel for Defendant:
Excuse me - when who came out, Your Honor. Did you say Dobie Gillis?

BY THE COURT:
Dobie Gillis case. You remember the case - was it Grant Parish?

BY MR. VIDRINE, Assistant District Attorney:
Sabine Parish.

BY THE COURT:
Yes, where there was no black foreman - where a black foreman had never been made - there was never a black foreman before and they said that counsel was ineffective in not finding that out and it was remanded. I've familiarized myself with those aspects of the case very well. But, I mean, I don't want to take away your right to argue but I did go into it in great detail.

BY MR. BURNES, Counsel for Defendant:
I'll try to be brief on it, Your Honor. This is one of the few pre-trial hearings that I didn't transcribe, but I did get the exhibits and talk to the attorney that was involved. I'd like to point out . .

BY THE COURT:
Certainly the court accepts the fact that there had never been a black person named as foreperson of a jury before that time. I mean you don't have to argue that because that was proven.

BY MR. BURNES, Counsel for Defendant:
Your Honor, one of the cases - the interesting thing in reviewing these cases there is reference to the Fourteenth Amendment. Well, the Fourteenth Amendment is both the due process clause and the equal protection clause. If you hunt for the due process clause and the equal protection clause you are going to find them both in the Fourteenth Amendment.

BY THE COURT:
That's the Johnson case you're talking about?

BY MR. BURNES, Counsel for Defendant:
Well, Your Honor, they cited the Johnson case.

BY THE COURT:
Johnson versus Puckett.

BY MR. BURNES, Counsel for Defendant:
Yes, and the reason I wanted to mention that is that they cited it, because by citing it when they have invoked the 14th Amendment they have involved both due process and equal protection. Now, there is some distinction, or they may have thought to be some distinction, in the historical development of this. For instance, in the Johnson vs Puckett case they refer to the Hobby case. A United States Supreme Court decision in which they did not give a relief and they said that the request there was under the nature of the due process of the 14th Amendment. But they said in the Johnson case we are looking at equal protection, which is also 14th Amendment but another section of the constitution. So, the reason that I am point out that we've hit that equal protection clause is because we have alleged the grounds that put us before you, not necessarily on the Hobby case, and incidentally the Hobby case, Your Honor had three descents. Now, I know that even if you

have a bare majority it is still a ruling but three descents indicate there well may be some problem with that being established law. Now, I think what you addressed the lawyers in the hearing you asked them, well, if you conceded that this grand jury is unconstitutionally impaneled as to a black person, why would it be unconstitutionally impaneled as to a white person. Good question. And, there are some answers to that Your Honor. One I think Peters versus Kiff, United States Supreme Court decision deals, I believe, that is with petit jurors, there they held in citation of that is 407, U.S. 493, 33 Lawyers Edition 83, 92 Supreme Court 2163 and it is a 1972 decision. They held that the indictment and conviction of a white man he could complain that neqroes were excluded, arbitrarily excluded. Now, besides that case by way of comparison if you look at Taylor versus Louisiana. For a long time in Louisiana we never had women on the jury unless they came down and volunteered. Of course, I filed a motion to quash a case one time and it got to the Louisiana Supreme Court and I lost by one vote and right after that I thin this case came out, and it says that a man can complain about that discrimination - has standing to complain because it denied him the cross section of the community. There was a case that came out that said the women can complain and a man can complain. Now, if a man can complain that a woman has to go down and volunteer to be on - which is not the law now. It used to be strange to see a woman on the jury. But, if a man cam complain that he is not part of that class or part of that group, then the same analogy would apply on racial exemptions or exclusions. More than that, Your Honor, Johnson vs Puckett reflected what is happening in the jurisprudence. They set it out in there. Besides the equal protection claim is the harm to society. You don't have to be a member of that group. It says the injury to equal protection caused by racial discrimination in the selection of members of a grand jury is not limited to the defendant.

BY THE COURT:

But, don't you think all of this is designed to avoid prejudice to the defendant? Isn't that the underlying basis and the underlying foundation for all of this?

BY MR. BURNES, Counsel for Defendant:

Judge, it is designed just like when we started our integration here awhile back in our schools. Now, I think we are at a 40th anniversary or something of that. It started now to where you say we are now protecting the system. There are cases that are saying that and Johnson says it. They put it on the equal protection clause and we put ourselves in Johnson in this case and we're saying that the system is wrong. How can you have a grand jury that says we can indicate black men and another grand jury constitute another way we can indictment white men. No, you can't, your Honor. It is either an invalid grand jury or it isn't. Your Honor, going back to Code of Criminal Procedure Article 872, to have a valid sentence you have to have a valid statute, a valid indictment, and a valid plea of guilty or judgment of conviction and this is not a valid indictment. It was returned by an unconstitutionally constituted grand jury. Again, law - we never get it all aligned, Your Honor.

BY THE COURT:

That's right.

BY MR. BURNES, Counsel for Defendant:

We can't. They put it on us. And the older we get the more we have to learn. Maybe years ago this didn't make a difference, but since 1991 it has, at least as far as this Johnson versus Puckett case is. Now they are talking about not the individuals group but the harm to society. That gets around, Your Honor, like those thats an objection, and its a reverse and that's an objection to where if you are excluding white people you can object whether you are a member of that group or not. Because, and what they are saving, the use the same language. They opened up this Johnson versus Puckett and they are talking about what equal protection means. It is not just that you are a member of that group. But, the harm to society. In other words you get that cross section, you get a fair grand jury. And, I'm not taking away from anything that was said at the other hearing, but I know, Your Honor, questioned the lawyers and they may well have responded adequately. I don't know. But, I ask them and they say that is what the judge was

saying, well, why is it not that group. That is why I dug out this Taylor case and that Peters case and why I analyze this Johnson versus Puckett case and realize the difference in due process and equal protection and this broadened concept of equal protection which means a harm to society. In other words, Your Honor, is to protect society's right of equal protection by saying you cannot - not Your Honor but the system - I know you didn't set it up wrong, but it is kind of inherited and passed down and this is the rule and we have to follow it. We have made a timely motion and based on that we submit that the motion to quash should have been granted. If it is granted then we are back to ground zero.

BY THE COURT:

Mr. Vidrine.

BY MR. VIDRINE, Assistant District Attorney:

Your Honor, we would adopt the argument that was made at the hearing when this first came up when Mr. Small was representing the...

BY THE COURT:

When Dobie Gillis came out.

BY MR. VIDRINE, Assistant District Attorney:

That is correct, Your Honor, the Sabine Parish case. In addition to that, Your Honor, we would simply say that in a case not too long ago, State versus Davis Second Circuit, February of this year, 1994, they referred to the Johnson versus Puckett case and in that case the court said, "In brief Davis argues that the statistical evidence from the records of the Registrar of Voters shows that between '71 and '91, 86.7% of the grand jury foremen were white and 13.3% black. He contends that this establishes a pattern of discrimination that violates equate protection" as argued by Mr. Burnes. Then the court said, "This court recently analyzed Caddo Parish's procedure for selecting jury foremen in State versus Thomas. We found that while the group against whom discrimination is asserted is a recognizable distinct class singled out for different treatment. The defendant did not prove what he needed

to prove." But, again it shows you that it has to be a distinct recognizable group and that is the same basis upon which Your Honor made the ruling earlier.

BY THE COURT:

All right. I'm prepared to rule. on Paragraph 3 of the Motion for a New Trial. This is the Court's ruling. Since Terry D. Campbell is a white person this court holds that the fact that at the time he was indicted that there had never been a black person named as a grand jury foreman in Evangeline Parish Louisiana, which incidentally is no longer the case, as ya'll know, that that does not constitute a violation of Mr. Campbell's constitutional rights including a due process violation. The court has already ruled in a similar motion with ample reasons being a motion to quash the indictment which was filed by Mr. Mike Small when he represented Mr. Campbell the first time around. The ruling is already in the record. The court adopts it by reference in ruling on this motion. Thank you. Proceed with Number 4 of the motion for a new trial.

The Supreme Court of the State of Louisiana

STATE OF LOUISIANA

VS. *NO.* 95-K- 0824

TERRY CAMPBELL

- - - - - - - -

IN RE: Terry Campbell; Defendant; Applying for Rehearing of this Court's Order dated October 2, 1995; Court of Appeal Third Circuit Number CR94-11401; Parish of Evangeline 13th Judicial District Court Division "A" Number 45,690

- - - - - - - -

November 3, 1995
Rehearing denied.

JCW
PFC
WFM
HTL
CDK
BJJ
JPV

Supreme Court of Louisiana
November 3, 1995

S/ Frans J. Labranche, Jr.
Clerk of Court
For the Court

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Chief Deputy Clerk

Barbara B. Cox
Deputy Clerk - Civil
Roberta D. Burnett
Deputy Clerk - Criminal

STATE OF LOUISIANA

No. 94 01140

Versus

TERRY CAMPBELL

BEFORE: JCP MTA MGS

ORDER

The Application for Rehearing herein having been duly considered:

IT IS ORDERED that a Rehearing be, and the same is hereby,

DENIED.

Lake Charles, Louisiana.

JUNE 7, 1996

S/JCP
S/MTA
S/MGS
Judges

Kenneth J. deBlanc
Clerk

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be . . . deprived of . . . liberty, . . . without due process of law; . . . .

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . .

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws . . . .

28 U.S.C. § 1257 provides, in pertinent part:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the

> United States, or where any title, right privilege, or immunity is specially set up or claimed under the constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Louisiana Code of Criminal Procedure, Article 8, provides:

> Unless the context clearly indicates the contrary, official titles, such as clerk of court, coroner, district attorney, and sheriff, include assistants and deputies.

Louisiana Code of Criminal Procedure, Article 413, provides:

> A. The grand jury shall consist of twelve persons plus a first and second alternate for a total of fourteen persons qualified to serve as jurors, selected or drawn from the grand jury venire.
> B. In parishes other than Orleans, the court shall select one person from the grand jury venire to serve as foreman of the grand jury. The sheriff shall draw indiscriminately and by lot from the envelope containing the remaining names to complete the grand jury. The envelope containing the remaining names shall be replaced into the grand jury box for use in filling vacancies as provided in Article 415.
> C. In the parish of Orleans, the court shall select twelve persons plus a first and second alternate for a total of fourteen persons from the grand jury venire, who shall constitute the grand jury. The court shall thereupon select one of the jurors to serve as foreman.
> D. The first and second alternates shall receive the charge as provided in Article 432 but shall not be sworn nor become members of the grand jury except as provided in Article 415.

Louisiana Code of Criminal Procedure, Article 648, provides, in pertinent part:

A. The criminal prosecution shall be resumed unless the court determines by clear and convincing evidence that the defendant does not have the mental capacity to proceed.
. . .

Louisiana Code of Criminal Procedure, Article 652 provides:

The defendant has the burden of establishing the defense of insanity at the time of the offense by a preponderance of the evidence.

Louisiana Revised Statute 14:30 provides:

A. First degree murder is the killing of a human being:
(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnaping, second degree kidnaping, aggravated escape, aggravated arson, aggravated rape, forcible rape, aggravated burglary, armed robbery, drive-by shooting, first degree robbery, or simple robbery.
(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;
(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given or has received anything of value for the killing.
(5) When the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve or sixty -five years of age or older.
(6) When the offender has the specific intent to kill or to inflict great bodily harm while engaged in the distribution, exchange, sale, or purchase, or any attempt thereof, of a controlled dangerous substance listed in Schedules I, II, III, IV, or V of the Uniform Controlled Dangerous Substances Law.

(7) When the offender has specific intent to kill and is engaged in the activities prohibited by R.S. 14:107.1(C)(1).
B. For the purposes of Paragraph A(2) of this section, the term "peace officer" means any peace officer, as defined in R.S. 40:2402, and includes any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, commissioned wildlife enforcement agent, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistant attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator.

. . .

Louisiana Revised Statute 14.30.1 provides:

A. Second degree murder is the killing of a human being:
(1) When the offender has a specific intent to kill or to inflict great bodily harm; or

. . .

Louisiana Revised Statute 14.31 provides:

A. Manslaughter is:
(1) A homicide which would be murder under either Article 30 (first degree murder) or Article 30.1 (second degree murder), but the offense is committed in sudden passion or heat of blood immediately caused by provocation sufficient to deprive an average person of his self-control and cool reflection. Provocation shall not reduce a homicide to manslaughter if the jury finds that the offender's blood has actually cooled, or that an average person's blood would have cooled, at the time the offense was committed; or
(2) A homicide committed, without any intent to cause death or great bodily harm.
(a) When the offender is engaged in the perpetration

or attempted perpetration of any felony not enumerated in Article 30 or 30.1, or of any intentional misdemeanor directly affecting the person; or

(b) When the offender is resisting lawful arrest by means, or in a manner, not inherently dangerous, and the circumstances are such that the killing would not be murder under Article 30 or 30.1

. . .

CRIMINAL DOCKET NO. 45,690-F

Jul 11 153 PM 194

STATE OF LOUISIANA	: 13TH JUDICIAL DISTRICT COURT
VERSUS	: PARISH OF EVANGELINE
TERRY D. CAMPBELL	: STATE OF LOUISIANA
Filed:_____	: _____ Dy Clk

ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1

The trial Court erred in overruling the Motion to Quash Grand Jury Indictment because defendant was charged with a Grand Jury Indictment which was returned by a Grand Jury which was illegally and unconstitutionally selected in that the Grand Jury foreperson selection process in Evangeline Parish was discriminatory and in violation of Louisiana and United States constitutional provisions.

ASSIGNMENT OF ERROR NO. 2

The trial Court erred in ruling on the issue of defendant's present capacity to proceed for the reason that the defendant's mental disease or defect and his lack of capacity to understand the proceedings against him and assist in his defense remained with him throughout the proceedings and exist to this date.

ASSIGNMENT OF ERROR NO. 3

The trial Court erred in overruling defendant's written Motion to Prohibit Two (2) Compelled Psychiatric Examinations by

Two (2) Separate Doctors Served on Defendant Less Than One Month Prior to His Second Degree Murder Trial, and in overruling defendant's oral Motion to Limit Expert Witnesses.

ASSIGNMENT OF ERROR NO. 4

The trial Court erred in overruling defendant's written Motion to Suppress Inculpatory Statements and Supplemental Motion to Suppress.

ASSIGNMENT OF ERROR NO. 5

The trial Court erred in ruling during the course of the trial on defendant's oral Motion to Suppress Inculpatory Statements (which was renewed during the course of the trial) and the expanded oral Motion to Suppress Inculpatory Statements (which was made on the grounds that the warrant was issued without probable cause).

ASSIGNMENT OF ERROR NO. 6

The trial Court erred when it refused to give refused to give defense requested jury charges number 2. 3, 4 and 5, all of which requested that negligent homicide be defined and be given to the jury as a responsive verdict which it could consider and return.

ASSIGNMENT OF ERROR NO. 7

The trial Court erred when it refused to give defense requested jury charge number 7 which was wholly correct and required in order to clarify ambiguity and inaccuracies which existed in the general charge on intent which was given to the jury.

ASSIGNMENT OF ERROR NO. 8

The trial Court erred when it overruled defendant's written objections to the proffered general jury charges which said objections were tendered to the Court timely in a document entitled

"Defense Objections to Proffered General Jury Charges." More specifically, the Court's charge defining manslaughter was incomplete and inaccurate and referred to enumerated and non-enumerated felonies in R.S. 14:30 and R.S. 14:30.1 when the Court's general charge did not specify the enumerated or nonenumerated felonies nor did the Court's general charge define the enumerated or nonenumerated felonies. Consequently, the jury did not have a full and fair definition of manslaughter and could not have adequately considered that verdict.

ASSIGNMENT OF ERROR NO. 9

The trial Court erred in failing to sustain defendant's objections to the proffered general jury charges.

ASSIGNMENT OF ERROR NO. 10

The trial Court erred in overruling defendant's Motion for New Trial.

ASSIGNMENT OF ERROR NO. 11

The trial Court erred in overruling defendant's Motion for Post-Verdict Judgment of Acquittal.

Respectfully Submitted By
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